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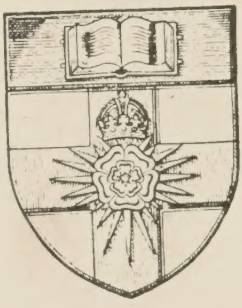

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THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

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BARRISTER-AT-LAW,

AND

J. G. THOMPSON,

BARRISTER-AT-LAW.

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The Right Hon. Ignatius John O'Brien.

Lords Justices of Appeal.

The Right Hon. Hugh Holmes.

The Right Hon. Richard R. Cherry.

Chancery Division.

The Right Hon. Charles A. O'Connor, M.R.

The Hon. Dunbar Plunket Barton.

Land Judge.

The Right Hon. John Ross.

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[These Reports will be cited as follows :—[1913] 1 I. R.]

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Mr. Justice Barton, .	R. W. LUCAS, WILLIAM M'GRATH, E. C. FARRAN,	Barristers-at-law.
Land Judge, ...	D. M. STEEN,	Barrister-at-law.
Land Commission, . .	JOHN EDWD. WALSH,	Barrister-at-law.

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read *propter subjectam materiam*. No assistance is to be derived, in this case, from *Donnellan* v. *O'Neill* (1), where there was a clear expression of intention that a named person should be a beneficial legatee, nor from *In re Garrard* (2), where the gift was to a vicar and churchwardens for the time being. I must add that I cannot accept the view which Mr. M'Sweeny put forward, in the course of his able argument, that this is to be treated as an abridged O'Hagan clause. It would be putting a strained and artificial construction upon the words of the testator to suppose that he contemplated a possible invalidity in the devise, and intended to prevent it, by making a beneficial gift to the parish priest for the time being, whoever he might be.

The only one of the cases cited which is at all like this one is *Thornber* v. *Wilson* (3). There were four gifts in the will in that case. The gift which resembles this one is the fourth. It was reserved at the first trial for further consideration, because it related to a surplus, and it appeared possible that the accounts might not show any surplus. Accordingly, it was not dealt with at the trial, which is reported in 3 Dr. 245, but it is dealt with in the report in 4 Dr. 350. It was a gift, subject to and after the expiry of a term of seven years, of the surplus of the produce of the sale of some of testator's real estate on trust to pay it to the then minister of the Roman Catholic Church of Kendal. Kindersley, V.-C., held the gift charitable. I assume that he was, to some extent, influenced by the character of the previous gifts. But his judgment contains passages which proceed upon the language of the particular gift itself, and have a bearing upon the present case. He applied the test, which may be applied in this case also, "whether the testator designates the individual as such, or as being the person who happens to fill the office"; and he proceeded to say (p. 351)—"A gift to a minister, as such, is a charitable bequest. I think here the intention was clearly to benefit the minister and chapel; it was not a personal bequest, with a description of the person to be benefited. A gift to a person *now* minister would have

(1) I. R. 5 Eq. 523. (2) [1907] 1 Ch. 382.
(3) 3 Dr. 245; 4 Dr. 350.

been different; the testator might be unacquainted with his name, and so only be capable of describing him by his office. And here the surplus is only to be realized at the end of seven years after the testator's death, which makes it stronger to show that the testator meant to benefit the chapel, not the particular person. Held, therefore, that the gift was void." This passage was adopted by Farwell, J., in *In re Delany*; *Conoley* v. *Quick* (1), and applied to a case where there was a gift, as here, for life to a widow, and afterwards to officials of a religious community, or their successors, which he held to be a gift to them not for their own benefit, but as holders of their office.

There remains the condition attached to the devise. The £1 for masses admittedly fails by reason of the death of the testator within three months of the will. The annuity of £10 for the blind boy is, in my opinion, a trust. The passage cited from Sugden on Powers (8th ed.), 106, is to the effect that a devise subject to a condition would now, perhaps in almost all cases, be construed a devise in fee upon trust, "and by this construction, instead of the heir taking advantage of the condition broken, the *cestui que trust* can compel an observance of the trust by a suit in equity." That passage has from time to time been acted on, *e.g.*, in *Wright* v. *Wilkin* (2). A charitable devise may be subject to a private trust; and the private trust will not fail from failure of the charitable gift.

The result, in my opinion, is that the parish priest of Urney is trustee for the blind boy in respect of the annuity of £10, and for the heir-at-law as to the balance.

Solicitor for the plaintiff: *King Houston.*
Solicitor for the defendant: *J. H. Gallagher.*

R. W. L.

(1) [1902] 2 Ch. 642, 646. (2) 2 B. & S. 232, affirmed 31 L. J. Q. B., 196.

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CORRIGENDA.

Page 360, foot-note (3), *for* "[1913]" *read* "[1912]".

,, 431, line 14, *before* "at p. 444," *insert* "Vol. I."

MEMORANDA.

In the Hilary Sittings, 1913, The Rt. Hon. Redmond J. Barry, Lord Chancellor, resigned.

The Rt. Hon. Ignatius John O'Brien, His Majesty's Attorney-General, was appointed Lord Chancellor.

In the subsequent Vacation, Thomas Francis Molony, Esq., K.C., His Majesty's Solicitor-General, was appointed Attorney-General.

In the Easter Sittings, 1913, John Francis Moriarty, Esq., K.C., was appointed His Majesty's Solicitor-General.

In the Trinity Sittings, 1913, The Rt. Hon. Thomas Francis Molony, His Majesty's Attorney-General, was appointed a Judge of the King's Bench Division.

John Francis Moriarty, Esq., K.C., His Majesty's Solicitor-General, was appointed Attorney-General; and

Jonathan Pim, Esq., K.C., was appointed His Majesty's Solicitor-General.

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1913.

IN RE CORCORAN, DECEASED; CORCORAN *v.* O'KANE.

Barton, J.
1912.
Feb. 8, 9, 26.

Will—Construction—Charitable devise—Will executed within three months of death—7 & 8 Vict. c. 97, s. 16—Devise to parish priest—Gift to the office and not for personal benefit—Trust for heir-at-law and annuitant.

By his will dated 14th June, 1888, a testator, after devising a life estate to his wife in certain freehold property consisting of two houses in the village of C., provided as follows:—"At my wife's demise I desire that the two houses become the property of the parish priest of U., on condition of paying £10 yearly to my brother's son, P., and also £1 yearly for masses for the repose of the souls of the deceased members of my family."

Testator died two days after the execution of the will. He was the owner in fee of the devised property. His widow died twenty-three years afterwards, on 22nd February, 1911. At that date the priest of the parish of U. was the third in succession in charge of the parish since testator's death.

Held (1), that the devise of the freehold house property to the parish priest of U. was a charitable devise, and, therefore, void as contravening the provisions of section 16 of the Charitable Donations and Bequests Act, the testator having died within three months of the date of the will,

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CORCORAN *v.* O'KANE.

(2) That the parish priest of U. was a trustee for testator's nephew P., in respect of the annuity of £10, and for the heir-at-law of testator as to the rest of the property.

ORIGINATING SUMMONS.

By his will, dated the 14th June, 1888, James Corcoran provided as follows:—"I bequeath to my wife, Sarah Corcoran, for the term of her natural life, my property in Castlederg, consisting of two houses, with all my stock and chattels absolutely. I also empower my wife to mortgage the property to the amount of £50, if necessary, for her support. At my wife's demise I desire that the two houses become the property of the parish priest of Urney, on condition of paying £10 yearly to my brother Patrick's son Patrick (the blind boy), and also £1 yearly for masses for the repose of the souls of the deceased members of my family."

Testator died two days after the execution of the will. He was the owner of the two houses in Castlederg in fee. The widow, Sarah Corcoran, died on the 22nd February, 1911. At the date of testator's death the Rev. James Connolly was parish priest of Urney, and he was succeeded in such office by the Rev. John M'Elhatton, who was succeeded by the defendant, the Rev. James O'Kane, who was priest of the parish at the date of the death of testator's widow, Sarah Corcoran. The plaintiff was a nephew and heir-at-law of testator and issued an originating summons, dated the 11th December, 1911, for the determination of the questions arising.

Henry, K.C. (with him *Wylie*), for the plaintiff, the heir-at-law:—

The gift to the parish priest of Urney of two houses in Castlederg is a charitable gift, and as the will was made only two days before testator's death, and purported to dispose of lands held in fee-simple, the same is void under the 16th section of 7 & 8 Vict. c. 97.

In *Thornber* v. *Wilson* (1), there was a gift to "the then

(1) 4 Dr. 350.

minister of the Roman Catholic chapel at Kendal," of a surplus of the produce of real estate, and it was held to be void under the Mortmain Act. See report of same case in 3 Dr. 245. The ground of the decision on this point was that the gift was intended for the benefit of the church and not of the individual—for the office and not for the person. That principle governs this case. The circumstances of this case make it abundantly clear that (in the words of Kindersley, V.-C., in *Thornber* v. *Wilson*, p. 249) "it was not by reason of any personal regard or design of personal bounty" that this testator devised to the individual who should happen to fill the office of parish priest at the time of his wife's death. This is a gift to the parish priest, not in his individual capacity, but in his character of priest; and the devise is for charitable uses. It is an attempt to endow the office of the priest of that particular Roman Catholic church, and for the benefit of the parish, and is not intended to confer a personal benefit on an individual with a description of the person to be benefited. It is really a gift for the endowment of the Roman Catholic faith: *Robb and Reid* v. *Dorrian* (1); *In re Delany*; *Conoley* v. *Quick* (2). In *In re Garrard* (3) a gift to the vicar and churchwardens for the time being of Kington "to be applied by them in such manner as they shall in their sole discretion think fit," was held charitable.

In the result the heir-at-law is entitled to the property devised, as in the case of an intestacy, charged with the payment of £10 a year to testator's nephew, Patrick, during his life.

M'Sweeny, K.C. (*John Muldoon* with him), for the defendant, the Rev. James O'Kane:—

The devise of the two houses in Castlederg to the parish priest of Urney is not a charitable gift, but the bequest of £1 yearly for masses is, and as the testator died within three months of the date of the will, this bequest is void. The result is that the defendant, the Rev. James O'Kane, who was the parish priest of Urney at

(1) I. R. 11 C. L. 292.
(2) [1902] 2 Ch. 642.
(3) [1907] 1 Ch. 382.

Barton, J. 1912.

CORCORAN v. O'KANE.

the date of the death of the tenant for life, takes the property freed from this obligation.

He takes the property absolutely subject to a yearly payment of £10 to testator's nephew, Patrick, described as the blind boy.

The devise is to an individual priest in his private individual capacity. It is not necessary that the name of the beneficiary should be stated if his identity be ascertained, nor does the mere description of a legatee as holding an office suffice to raise any inference that a charitable trust is intended. It is not a gift to the parish priest *or his successors*. *Doe* v. *Aldridge* (1); *Donnellan* v. *O'Neill* (2); *In re Delany*; *Conoley* v. *Quick* (3); *Robb* v. *Dorrian* (4); *In re Delany's Estate* (5); *In re Harbison*; *Morris* v. *Larkin* (6).

In *Thornber* v. *Wilson* (7) the purpose of the four gifts in question was obvious, and the whole scope and provisions of the will pointed to charitable purposes, and that was the basis of the decision. "It appears to me," said the Vice-Chancellor, "from the whole scope of the will, testator had in view the endowment of two chapels, the one at Lawklands, the other at Kendal."

In two of the gifts in question the words "and his successors" occur. In the absence of such words, even if any office be named, the gift is a gift to the legatee beneficially. See judgment of Palles, C.B., in *Robb* v. *Dorrian* (4). That also was the principle of the decision in *In re Delany* (8), and in other cases already referred to. In *Cocks* v. *Manners* (9), there was a direct gift to a religious institution. In *In re Garrard* (10), the words *ex facie* negatived any beneficial interest in the vicar and churchwardens of Kington, and showed clearly that a gift to charitable uses was intended. Even if this be held a charitable gift, there may be a good beneficial gift to the parish priest or his successor treating the gift as an abridged O'Hagan clause: *Donnellan* v. *O'Neill* (2).

Feb. 26.

BARTON, J.:—

The testator having died within two days of the execution of

(1) 4 T. R. 264.
(2) I. R. 5 Eq. 523.
(3) [1902] 2 Ch., at p. 647.
(4) I. R. 11 C. L. 292.
(5) 9 L. R. Ir. 226.
(6) [1902] 1 I. R. 103.
(7) 3 Dr. 245; 4 Dr. 350.
(8) [1902] 2 Ch. 642.
(9) I. R. 12 Eq. 574.
(10) [1907] 1 Ch. 382.

the will, the devise of the two houses in Castlederg was, if it was a charitable devise, invalid by reason of section 16 of the Charitable Donations and Bequests Act. No question arose during the lifetime of the widow, who was life-tenant of the property. But, after her death, it has become necessary to ascertain whether the devise of the two houses was a charitable devise or not.

He says :—"At my wife's demise I desire that the two houses in Castlederg become the property of the parish priest of Urney." Is that a devise to a designated person beneficially, or to the holder of the office of parish priest for the time being at his wife's decease? The testator did not name an individual. He identified the devisee by his office only. He meant not the *now* parish priest, but the *then* parish priest, because the houses were only *then* to become the property of any parish priest, and he was to have active obligations. The devise was to operate at an indefinite future time, which might be near or distant. The testator's wife might—as she did – survive him by many years; and the parish priest, at her death, might—as happened—turn out to be a remote successor of the *then* parish priest. Is it not the reasonable inference from testator's language, that he intended that the devisee should be, not any particular individual, but the parish priest, at his wife's decease, whoever he might be, and without regard to who he might be? If so, should not the gift be construed to be a gift to the office and of a charitable nature? I think these questions should be answered in the affirmative; and I cannot help surmising that, if the testator had not died within three months of the will, the devise would have been treated and supported as charitable by the devisee, or by his successor, if, as sometimes happens, on the devisee's death some creditor or relative of the devisee had sought to treat it as beneficial.

Very few of the authorities are of any help. I am not disposed to apply to this case the passage which has been quoted from the judgment of the Lord Chief Baron in *Robb* v. *Dorrian* (1). The gift in that case was to the bishop, and also "to his successors in the bishopric"; and the Lord Chief Baron's words should be

(1) I. R. 11 C. L. 292.

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read *propter subjectam materiam*. No assistance is to be derived, in this case, from *Donnellan* v. *O'Neill* (1), where there was a clear expression of intention that a named person should be a beneficial legatee, nor from *In re Garrard* (2), where the gift was to a vicar and churchwardens for the time being. I must add that I cannot accept the view which Mr. M'Sweeny put forward, in the course of his able argument, that this is to be treated as an abridged O'Hagan clause. It would be putting a strained and artificial construction upon the words of the testator to suppose that he contemplated a possible invalidity in the devise, and intended to prevent it, by making a beneficial gift to the parish priest for the time being, whoever he might be.

The only one of the cases cited which is at all like this one is *Thornber* v. *Wilson* (3). There were four gifts in the will in that case. The gift which resembles this one is the fourth. It was reserved at the first trial for further consideration, because it related to a surplus, and it appeared possible that the accounts might not show any surplus. Accordingly, it was not dealt with at the trial, which is reported in 3 Dr. 245, but it is dealt with in the report in 4 Dr. 350. It was a gift, subject to and after the expiry of a term of seven years, of the surplus of the produce of the sale of some of testator's real estate on trust to pay it to the then minister of the Roman Catholic Church of Kendal. Kindersley, V.-C., held the gift charitable. I assume that he was, to some extent, influenced by the character of the previous gifts. But his judgment contains passages which proceed upon the language of the particular gift itself, and have a bearing upon the present case. He applied the test, which may be applied in this case also, "whether the testator designates the individual as such, or as being the person who happens to fill the office"; and he proceeded to say (p. 351)—"A gift to a minister, as such, is a charitable bequest. I think here the intention was clearly to benefit the minister and chapel; it was not a personal bequest, with a description of the person to be benefited. A gift to a person *now* minister would have

(1) I. R. 5 Eq. 523.

(2) [1907] 1 Ch. 382.

(3) 3 Dr. 245; 4 Dr. 350.

been different; the testator might be unacquainted with his name, and so only be capable of describing him by his office. And here the surplus is only to be realized at the end of seven years after the testator's death, which makes it stronger to show that the testator meant to benefit the chapel, not the particular person. Held, therefore, that the gift was void." This passage was adopted by Farwell, J., in *In re Delany*; *Conoley* v. *Quick* (1), and applied to a case where there was a gift, as here, for life to a widow, and afterwards to officials of a religious community, or their successors, which he held to be a gift to them not for their own benefit, but as holders of their office.

There remains the condition attached to the devise. The £1 for masses admittedly fails by reason of the death of the testator within three months of the will. The annuity of £10 for the blind boy is, in my opinion, a trust. The passage cited from Sugden on Powers (8th ed.), 106, is to the effect that a devise subject to a condition would now, perhaps in almost all cases, be construed a devise in fee upon trust, "and by this construction, instead of the heir taking advantage of the condition broken, the *cestui que trust* can compel an observance of the trust by a suit in equity." That passage has from time to time been acted on, *e.g.*, in *Wright* v. *Wilkin* (2). A charitable devise may be subject to a private trust; and the private trust will not fail from failure of the charitable gift.

The result, in my opinion, is that the parish priest of Urney is trustee for the blind boy in respect of the annuity of £10, and for the heir-at-law as to the balance.

Solicitor for the plaintiff: *King Houston.*
Solicitor for the defendant: *J. H. Gallagher.*

R. W. L.

(1) [1902] 2 Ch. 642, 646. (2) 2 B. & S. 232, affirmed 31 L. J. Q. B., 196.

Barton, J.
1912.
April 26, 27, 30.
May 2, 15.

FITZPATRICK *v.* VERSCHOYLE.

Turbary—Right of—Profit à prendre—*Purchase agreement—Tenant purchaser—Land Purchase Acts—Free turbary on specified bog—Right of allotment by owner of bog—Convenience—Management of bog.*

The plaintiffs were seven tenants, on the estate of Lord S., who purchased their holdings under the Land Purchase Acts by agreements, which were all executed upon the same day, and contained the following provision:—"The tenant is to have the right of turbary for his own use on the bog in the vendor's possession, marked No. 1 on the map." Lord S., after retaining the bog in his own possession for several years, conveyed it to the defendant in fee-simple, for valuable consideration, subject to the rights of the plaintiffs. The plaintiffs had no fixed turf-banks which they could claim as their own. It was proved that irregular and indiscriminate cutting had caused, and was calculated to cause, waste and bogslides, and thereby to injure and ultimately destroy the bog. Disputes arose between the plaintiffs and defendant as to the nature and extent of their respective rights, and as to the manner in which, and person by whom, the turf-banks should be allotted. These questions were raised by claim and counter-claim in the action.

Held: (1) That the plaintiffs were entitled to enter upon the bog, and to cut and carry away free turf for the use of their holdings, and for that purpose to have annually allotted to them, at a reasonable time of the year, turf-banks in such parts of the bog reasonably convenient to them, as should not be prejudicial to the due preservation of the bog, or be likely to cause waste or bogslides therein, and to reasonable notice of such allotment. (2) That the defendant was entitled to annually allot, at reasonable times of the year, and after reasonable notice to plaintiffs, turf-banks at such places in the bog, reasonably convenient to them, as should not be prejudicial to the preservation of the bog, or be likely to cause waste or bogslides therein. (3) That in allotting turf-banks the primary consideration should be the due preservation of the bog, and that the defendant's right of working the remainder of the bog, for his own profit, was subject to, and should be subordinated to, the plaintiffs' prior right of turbary.

Trial of Action.

The plaintiffs were seven out of ten tenants on the Kildare estate of Lord Seaton, who purchased their holdings under the Land Purchase Acts. Their agreements for purchase were all dated on the same day, March 1st, 1905, and it was provided in each agreement that "the tenant is to have the right of turbary for his own use on the bog in vendor's possession, marked No. 1

on the map." The agreements were dated on May 1st, 1908, and the fiat indorsed on the respective purchase agreements contained the following words:—"together with such right of turbary for the purchasing tenant's own use as has heretofore been exercised by him on the bog in the vendor's possession, marked No. 1 on estate map, and containing 248A. 3R. 8P." By indenture dated June 24, 1910, Lord Seaton conveyed the bog to the defendant in fee-simple, subject to the rights of the plaintiffs. On the application of the tenant-purchasers, by order dated March 10, 1909, Ross, J., amended the respective fiats by omitting the words "together with such right of turbary for the purchasing tenant's own use as has been heretofore exercised by him," and substituting therefor the words "together with the right of *free* turbary for his own use." By order dated November 2nd, 1910, Ross, J., struck out the word *free*, making the fiat uniform with the purchase-agreement.

The plaintiffs by their statement of claim alleged that the defendant had interfered with them in the exercise of their right of turbary, and had let the banks where they had formerly cut turf to other persons, and that the defendant claimed to limit their right to cut turf to such portions of the bog as he should point out to them and to remove it to banks, situated on portions of the bog remote from their holdings and containing turf of an inferior quality. The plaintiffs claimed that each of their respective holdings was vested in each of them respectively, together with the right of free turbary for their own use on the bog in the defendant's possession, and prayed for an injunction to restrain the defendant, his licensees, &c., from interfering with or disturbing them in the exercise and enjoyment of their respective rights of turbary. The defendant counterclaimed for a declaration that none of the plaintiffs was entitled to the right of free turbary claimed by them, and for an injunction restraining the plaintiffs, their servants, and agents from exercising their rights of turbary in such a way as to cause waste or injury to the bog, or create the risk of bogslides, and from interfering with the defendant's lessees of turbary rights upon the bog, and from cutting turf for sale or otherwise than for use upon their respective holdings on banks selected in exercise of their rights of turbary. Disputes

Barton, J. 1912. FITZPATRICK v. VERSCHOYLE.

had arisen between the plaintiffs and the defendant as to the nature and extent of their respective rights; as to persons by whom, and purposes for which, turf-banks should be allotted; and as to the relative priority of plaintiffs' convenient exercise of their right of turbary, and defendant's right of working the remainder of the bog as a commercial undertaking. The evidence is sufficiently referred to in the judgment.

James O'Connor, *K.C.*, and *T. H. Maxwell*, for the plaintiffs:—

The plaintiffs took their holdings under purchase-agreements giving them rights, whatever they were, over the bog in question, and the defendant purchased that bog subject to those rights. The purchase-agreements gave them a right to cut turf for the use of their holdings; and the second amendment of the fiat of the purchase-agreements, by omission of the word "free," makes no difference. The plaintiffs, we submit, are entitled to cut in any part of defendant's bog, so long as they act reasonably; and the defendant is not entitled to confine them to any particular place, even though sufficient and convenient: *Hargrove* v. *Congleton* (1). *A fortiori* the defendant cannot require plaintiffs to cut in an inconvenient place, nor is the defendant entitled to make a successful working of his bog as a commercial undertaking. In *Duggan* v. *Carey* (2) the lease expressly gave the power of pointing out the places where the turf was to be cut. The decision is put on that ground, and on that ground only, by Pigot, C.B. See p. 216 of the report. The passage in the judgment of Sir Andrew Porter, M.R., in *Dawson* v. *McGroggan* (3), is only a *dictum* in a case in which the decision itself was in favour of the tenants, and is in conflict with *Hargrove* v. *Congleton* (1).

On the evidence in the case the plaintiffs have acted in a most reasonable manner, and we ask the Court so to hold.

G. FitzGibbon, *K.C.*, and *Cecil Fforde*, for the defendant:—

The dictum of Pigot, C.B., in *Duggan* v. *Carey* (2) only applies to an actual grant under a lease or fee-farm grant, and the case was decided on the principle that there is no derogation from a grant. Here the plaintiffs became tenant-purchasers, and have a

(1) 12 Ir. C. L. R. 362.
(2) 8 Ir. C. L. R. 210, 216.
(3) [1903] 1 Ir. R. 97.

profit à prendre subject to the right of the owner in fee to direct and control the method of the exercise of their *profit à prendre*. The result would be chaos if each tenant-purchaser could go to cut turf where he chose. The end would be confusion and constant disputes. In *Dawson* v. *McGroggan* (1) Sir Andrew Porter, M.R., speaks of the right of turbary, observing that there was no interference with those cutting turf, "save such as is always exercised by an owner in fee over whose land there is a right of turbary, that is, the power to point out the place where those who have the right may reasonably exercise it."

Since the decision of *Hargrove* v. *Congleton* (2) and other cases, the whole system of land purchase has been inaugurated and grown up, and rights such as those now in question have sprung up which were never contemplated before the Act. Here the words of the purchase-agreements are "the right of turbary," and that must mean a right to be allotted turbary.

See also *Caldwell* v. *Hazley* (3), and *Jameson* v. *Fahey* (4).

May 15.

BARTON, J.:—

The plaintiffs were seven out of ten tenants, on the Seaton estate, who purchased their holdings under the Land Purchase Acts, by agreements, which were dated on the same day, 1st March, 1905. In nearly all of these agreements the following words occurred:—"The tenant is to have the right of turbary for his own use on the bog in vendor's possession, marked No. 1 on Map." The agreements were fiated by the Irish Land Commission on May 1st, 1908; and the fiat included the words, "Together with such right of turbary for the tenant's own use as has heretofore been exercised by him on the bog in the vendor's possession, marked No. 1 on estate map, and containing 248A. 3R. 8P."

The first question is whether plaintiffs' right is a right of *free* turbary. It is necessary to refer to the proceedings before the Land Judge. Ross, J., in the exercise of his jurisdiction, amended the fiat by omitting the words "together with such right of turbary for the tenant's own use as has been heretofore exercised by him," and substituting therefor the words

(1) [1903] 1 Ir. R. 97.
(2) 12 Ir. C. L. R. 362.
(3) 45 Ir. L. T. R. 137.
(4) [1907] 1 Ir. R. 411.

Barton, J. 1912. FITZPATRICK v. VERSCHOYLE.

"together with the right of free turbary for his own use." His Lordship held that the words in the fiat had been inserted without the consent of the tenant, giving him, instead of a right of free turbary, such right as he formerly exercised, which was none at all. The defendant, who in 1910 purchased the bog subject to plaintiffs' rights of turbary, applied to Ross, J., objecting to the amendment of the fiat, and claiming that he, as purchaser from Lord Seaton, should be authorized to select turbary for each tenant. Ross, J., refused the latter application, leaving the parties to have their rights in that respect decided in an action, such as the present, to be instituted for that purpose. He struck out the word "free," not because he did not think the right to be free, but in order to make the fiat exactly uniform with the agreement.

Was the right which was given to these tenants a right of *free* turbary? I respectfully agree with Ross, J., in thinking that it was free. At the close of the trial the contrary view was not pressed; but it was pressed before action, and in the statement of defence; and to that extent it is admitted that the plaintiffs' action was necessary.

The next question is as to the method of selecting or allotting turf-banks. Both sides admitted that the selection or allotment must be reasonable. But how, and by whom, is the turbary to be selected; and on what principle?

None of the authorities which were cited in the arguments is directly in point. This case is distinguishable from *Caldwell* v. *Hazley* (1). In that case there was no *profit à prendre* in any particular lands, but only a contractual right to be given firing. Here there is a *profit à prendre* on a specified bog, given for valuable consideration, as part of the bargain of sale of the estates under the Land Purchase Acts.

A passage in *Dawson* v. *McGroggan* (2) was relied upon, where Sir A. M. Porter, M. R., referring to certain tenants exercising a right of turbary on a landlord's bog, observed that there was no "interference with those cutting turf, save such as is always exercised by an owner in fee over whose land there is a right of turbary, that is the power to point out the place where

(1) 45 Ir. L. T. R. 137. (2) [1903] 1 Ir. R. 92.

those who have the right may reasonably exercise it." That observation was applied to a case of landlord and tenant, or rather sub-tenant, and of an estate bog which was managed by an under-agent. But this bog has passed out of that stage; and the relative situation is not the same as that which may exist between a landlord and a tenant with rights over the landlord's bog. Here the owner has sold their holdings to the tenants, with a right of turbary on a bog, which he retained in his own possession, and subsequently sold, subject to their rights.

Reference was made to *Hargrove* v *Congleton* (1), where an old lease of 1735 contained a covenant by the lessor that the tenant might cut and carry away from the bogs C and B (the landlord's property) turf sufficient to be expended on the premises demised, and it was held that the landlord was not at liberty to confine the tenant to a particular part of the bog allotted to him, although it was sufficient and convenient. The Court proceeded upon the words of the grant which were to take turf, and not to have turbary assigned or allotted, and also to some extent on the date of the lease, which was prior to the time when the modern practice of allotting turf-banks became prevalent.

In *Duggan* v. *Carey* (2), Pigot, C.B., treated an express power of allotment as being intended to prevent indiscriminate and wasteful cutting of the bog, but not otherwise to impede or restrict the enjoyment of the use of turbary.

Turning to the present case, it seems to me that it must have been intended that the owner of the bog should have an implied power of allotment for the limited purpose mentioned by Pigot, C.B.

Ten persons (including the plaintiffs) signed agreements on the same day, under which they were to acquire rights of turbary, defined in nearly the same language, to be exercised over the same bog, and to be exercised, of necessity, at the same season of the year. If they were all intended to select their own turf-banks, upon what principle was the selection to be carried out? They had no fixed turf-banks which they could claim as their own. In what order were they to select? I heard no reasonable answer to that question. To suggest that they should make the selection in alphabetical order, or in order of

(1) 12 Ir. C. L. R. 362. (2) 8 I. C. L. R. 210, 216.

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age, or upon the principle of "first come, first served," would be obviously absurd. But no suggestion was made which would be less absurd. I cannot suppose that the parties to these agreements contemplated anything so chaotic as that an unrestricted concurrent right of selection should be conferred upon the ten purchasers.

Again, the evidence shows that the indiscriminate cutting of turf would be likely to cause waste and bogslides, and to injure and ultimately destroy the bog. Surely it must have been contemplated that there should be a power vested in somebody of preventing the destruction of what was the subject-matter of the rights of all the parties.

On the other hand, the defendant contends that he is at liberty to allot turf-banks, with a primary regard to his own profitable management of the remainder of the bog. There is nothing to be found in the history of the bog, or in the circumstances of the case, or in the authorities, to warrant that contention. The defendant purchased the bog subject to the plaintiffs' prior rights. I am of opinion that the defendant's right to work the remainder of the bog commercially and for his own profit is subject to, and should be subordinated to, the plaintiffs' prior rights to enter upon the bog, and to cut and carry away sufficient turf for the use of their holdings, in such reasonably convenient places as shall not be prejudicial to the due preservation of the bog.

The words in the agreements conferring the rights of turbary are so general, and the other materials at our disposal in this case are so scanty, that it is not an easy task to reconcile these conflicting rights and claims. But, after giving the matter careful consideration, I arrive at the following conclusions:—

Having regard (1) to the circumstance that the bog would be injured and might be destroyed by irregular and indiscriminate cutting; and (2) to the fact that the same rights were given simultaneously to as many as ten purchasers on the same bog, I infer that it was contemplated that the owner of the bog should allot the turf-banks.

In view of the damage which, from the nature of the subject-matter, may be caused to the bog by indiscriminate and irregular cutting, I infer that the owner is entitled, in allotting, to have

primary regard to the due preservation of the bog. Having regard to the previous history of the bog, and to the fact that the defendant purchased the bog subject to the plaintiffs' prior rights, I am of opinion that, in the selection of banks, the convenient exercise by the plaintiffs of their right of turbary is a prior consideration to the defendant's profitable working of the remainder of the bog.

After the plaintiffs have been provided with reasonably convenient banks for the season, in places not injurious to the bog, the defendant can make what profit he likes out of the rest, so long as he does not do any act, or allow cutting to such an extent, as may be inconsistent with, or may derogate from, the prior grant to the plaintiffs.

It follows that the plaintiffs' banks must be allotted at or before the usual and proper season for letting turf. There should be a reasonable notice given to the plaintiffs, not a notice posted up to the public generally, as was done in this case, but a notice to them. If it is reasonable notice, and they disregard it, the defendant may allot without consulting them. If they comply with the notice, he may, and probably will, have regard to their wishes, if *bona fide* expressed, as the best but not necessarily the only evidence of what is convenient for them. If the parties fall out, there will always be before them the risk of litigation and costs. I see no better way of protecting both sides than by giving both sides declarations and injunctions which either side can if necessary enforce. I trust that they will arrive at some understanding or arrangement or practice which will work smoothly on these lines.

The plaintiffs are entitled to enter upon the bog and to cut and carry away free turf for the use of their holdings, and for that purpose to have annually, at a reasonable time of the year, allotted to them sufficient turf-banks in such parts of the bog, reasonably convenient to them, as shall not be prejudicial to the due preservation of the bog, or be likely to cause waste or bogslides therein; and to reasonable notice of such allotment; and to an injunction to restrain the defendant from hindering or interfering with the plaintiffs in the exercise and enjoyment of the above rights.

The defendant is entitled to annually allot, at reasonable times of the year, and after reasonable notice to the plaintiffs, turf-

Barton, J. 1912.

FITZPATRICK v. VERSCHOYLE.

banks, at such places in the bog reasonably convenient to them as shall not be prejudicial to the preservation of the bog, or be likely to cause waste or bogslides therein. He is also entitled to an injunction restraining the plaintiffs from interfering with the defendant's lawful lessees of turbary rights on the said bog. I cannot say that there has been any actual interference by the plaintiffs with the defendant's lessees. But the evidence shows that there are grounds for apprehending interference, and that the defendant is entitled to an injunction.

As to the costs, the defendant has failed in most of the matters in dispute, and has succeeded in no more than a fraction of them. He disputed the tenants' rights to free turbary until a late stage of the trial. He set up a case of a notice disregarded, which was not sustained, because he gave them no notice, except the advertisement to the general public. He took up the position that his profitable user of the balance of the bog was the governing consideration in allotting banks, rather than, as I think, the convenient exercise by plaintiffs of the rights subject to which defendant purchased the bog. On the question of allotment of turf-banks, the plaintiffs have not succeeded; neither can defendant be said to have altogether succeeded.

The order as to costs will be that the defendant shall pay to the plaintiffs four-fifths of their costs of the action. There will be no costs of the counter-claim, as regards a considerable part of which defendant has not succeeded.

I cannot refrain from expressing a hope that, with the help of these declarations, further litigation may be avoided. The vague terms in which the tenants' rights of turbary were described, in the agreements, rendered some misunderstanding almost inevitable. If I can be, before the order is drawn up, of any further assistance to the parties, I shall be glad to consider any point which may be submitted to me.

Solicitors for the plaintiffs: *A. D. Kennedy & Son.*
Solicitor for the defendant: *H. K. Toomey.* R. W. L.

IN THE MATTER OF THE ESTATE OF EDWARD MORE O'FERRALL.

Ross, J.
1912.
Oct. 31.
Nov. 6.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 24, *sub-s.* 8 *—Insolvent estate—Sum for arrears of rent, to whom payable.*

Where upon the sale of a settled estate through the Irish Land Commission arrears of rent are due to the vendor (tenant for life) at the date of the purchase agreements, the sum payable in respect of those arrears under section 24, subsect. 8, of the Irish Land Act, 1903, is a sum earmarked and distinct from the rest of the purchase-money, and is payable to the vendor, notwithstanding that the rest of the purchase-money is insufficient to meet the claims of incumbrancers thereon.

OBJECTION to the allocation schedule.

The sum of £234 3*s.* 6*d.* appeared at item A on part 3 of the allocation schedule. The said sum represented the amount of arrears of rent (not exceeding one year) due in respect of the holdings in part 3 of the schedule at the date of the agreements for purchase, 1st November, 1909. At this item the examiner put the following note:—"Allow, but, as item No. 5 on this part of the schedule will not be met in full, it is reserved for the Judge as to whether this sum should be paid to the vendor or to the claimants at No. 5."

At No. 5 on part 3 of the schedule was set out the mortgage for £5000, dated 5th March, 1870, and now vested in the objectors. The purchase-money of the estate was insufficient to discharge the said mortgage, if paid in the priority in which it now stood in the schedule. The objectors submitted that their mortgage of 5th March, 1870, was entitled to be paid in priority to the said item A on the schedule, and that the schedule should be amended accordingly.

Since the year 1881 the vendor had been in receipt of the rents and profits of the lands, subject to the said mortgage as tenant for life under a settlement of 2nd July, 1870, and had paid all interest on the said mortgage, and all outgoings in full up to 14th December, 1911, the date when the purchase-money was paid into the Bank of Ireland.

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In re O'FERRALL'S ESTATE.

Jellett, K.C., for the objectors, the mortgagees:—

The question is, whether the vendor is entitled to take out of the purchase-money this sum of £234 3*s.* 6*d.* in priority to the mortgagees, notwithstanding that the estate is insolvent. Section 24 (8) of the Act of 1903 was enacted in the interest of a limited owner entitled to arrears of rent at the date of the agreement: *In re Crosbie's Estate* (1); but that is as between limited owner and remainderman, but in the present case the question is as between the owner and a mortgagee. "The purchase-money, although intended to include arrears, is arrived at as a bulk sum, and an attempt to ascertain its component parts would lead to hopeless confusion": *per* Holmes, L.J., in *In re Crosbie's Estate* (1). The person entitled to the arrears of rent gets "a charge fixed and declared by law as of the date of the agreement for the purchase": *per* Walker, L.-C., in *In re Viscount Ashbrook's Estate* (2). The date of the objectors' charge is 5th March, 1870. The vendor gets a charge dated November, 1909. How can the vendor get priority over a charge created in 1870? We both have charges, but we must be paid in proper priority.

A. C. Meredith, K.C. (with him *Hugh Kennedy*), for the vendors:—

The practice up to now has been to place on the allocation schedule the claim under section 24 (8) in priority to all claims in respect of superior interests or incumbrances affecting the fee-simple: *per* Wylie, J., in *In re Viscount Ashbrook's Estate* (2). If there was any interest due to the mortgagees, I admit it would come out of my year's arrears, because all outgoings must be paid first. Here I have discharged all outgoings up to 1911. A mortgagor in possession is entitled to the rents subject to paying all outgoings. The purchase-money is segregable. A. represents the purchase-money of the arrears of rent, B. represents the purchase-money of the lands. The objectors were never incumbrancers on A. at all. If the vendor had collected these arrears, no one could have taken them from him. Fitz Gibbon, L.J., foresaw that this

(1) [1907] 1 I. R. 116. (2) [1909] 1 I. R. 157

question would arise as between the owner and the incumbrancers, and expressly left it open in *In re Bandon's Estate* (1).

Hugh Kennedy:—

The vendor was not the original mortgagor, and there is no covenant by the vendor to pay this debt, as the vendor was not a covenantor in the transfer of mortgage. This sum mentioned in section 24 (8) is always treated as income, and never as capital: *In re Bandon's Estate* (1).

Jellett, K.C., in reply:—

The arrears, whatever they were formerly, are now become part of the purchase-money of the estate, and cannot be segregated therefrom: *In re Crosbie's Estate* (2). The vendor is entitled to be put on the schedule in respect of his year's arrears of rent; the only question is as to where he is to come in. The cases cited do not touch the paramount claim of an incumbrancer.

Ross, J.:— Nov. 6.

The question now raised has not yet been the subject of judicial decision. It depends upon section 24, sub-section 8, of the Irish Land Act of 1903. That sub-section provides that in the case of the sale of an estate where, at the date of the agreement, arrears of rent were due in respect of any holding on the estate, a sum equivalent in amount to those arrears, but not exceeding in any case one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use.

There are several cases dealing with the application of the sub-section as between tenants for life and remaindermen. In this case the question arises as between the tenant for life and a mortgagee on the inheritance. Up to the present it has always been the practice to place on the allocation schedule the claim under this sub-section in priority to all other claims; that is to say, a sum equivalent to the arrears of rent due in respect of any holding, but not exceeding in any case one year's rent. It must,

(1) [1908] 1 I. R. 120. (2) [1907] 1 I. R. 116.

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according to the sub-section, be due at the date of the agreement for purchase, and it must be paid to the person who would have been entitled to receive those arrears for his own use. In ascertaining the amount payable, there have always been deducted from the sum all unpaid outgoings payable by the person entitled to the rent, so that he only receives what he would have been entitled to for his own use.

The contention of the mortgagee in the present case is intended to put an end to this practice. The money realized is insufficient to satisfy the mortgage by a sum of £1,500. It is contended that, as the date of the mortgage is 1870, and the date when this sum became a charge is 1909, the prior charge must take priority. It is further urged that the arrears became part of the purchase-money, and undistinguishable therefrom.

There is no personal covenant in this case binding the vendor to pay the money secured by mortgage.

It is hardly necessary for me to point out, as has been done in other cases, that the great object of the Act of 1903 was to facilitate sales. The question of arrears was always a great obstruction. It was enacted by prior Acts that all arrears due at the date of the agreement must be wiped out. The landlord, as a general rule, could not afford to abandon his arrears. Therefore, no sale could take place. The only way to get over the difficulty was to add the arrears to the purchase-money. This was, however, very unfair to the tenant for life. The added arrears became the property of the remainderman. The tenant for life only received the interest for his life. It was to remedy this that the sub-section was inserted. An arrear, being a sum equivalent to one year's rent, is added to the purchase-money, but continues to be the property of the tenant for life, and must be paid to him on the distribution of the purchase-money. Until a receiver is appointed or some effective step is taken for the realization of the mortgage the mortgagor in possession is entitled to receive the rents for his own use. The mortgagee here, who was paid his interest up to the date of the agreement, has no claim on it whatever.

In order to effect a sale, which is supposed to be for the benefit of everybody, vendor, tenant, incumbrancer, and remainderman, the vendor gives up his right to his arrear. He gets in exchange

a part of the purchase-money earmarked for the purpose and distinct from the rest of the purchase-money. The compensation is limited to an amount not exceeding a year's rent.

I am, therefore, of opinion that it would be contrary to the express words and spirit of the section to allow the sum so preserved for the vendor to be pooled with the general purchase-money of the estate.

Solicitors for the objectors: *William Roche & Sons.*
Solicitors for the vendor; *A. O'Hagan & Son.*

D. M. S.

IN RE BERRYMAN, DECEASED: BERRYMAN *v.* BERRYMAN.

M. R.
1912.
Oct. 29.
Nov. 19.

Will—Construction—Gift to widow for benefit of children—Trust.

A. bequeathed his property to his wife, in the following terms:—"I leave and bequeath all my property, chattels, money, bank shares, and my life insurance, or whatever I am possessed of, or entitled to, to my beloved wife to be disposed of as she may think best, for the good of our children."

Held, that under this bequest, the wife became entitled beneficially to the whole of the property.

ORIGINATING SUMMONS.

The testator, William James Berryman, made his will in the following terms:—

"I William James Berryman, of Ballylifford, in the parish of Ballinderry, in the county of Derry, do, make this my last will and testament. I leave and bequeath all my property, chattels, money, bank shares, and my life insurance, or whatever I am possessed of or entitled to, to my beloved wife, to be disposed of as she may think best for the good of our children."

At the time of the said testator's death he was possessed of the following property: (*a*) A farm of land held in fee-simple; (*b*) a policy of insurance on his life; (*c*) twelve Northern Bank shares; (*d*) farm stock and chattels. He left him surviving his

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widow, Martha Berryman and the following children :—Esther, Anna Mary, William John, Martha Elizabeth, Samuel Charles, Thomas James.

Martha Berryman, the widow, was on the 13th February, 1912, declared to be a person of unsound mind, and the present summons was brought by the committee of her estate, who was also the administrator (with the will annexed) *de bonis non* of the estate, to determine the following questions :—

(1) Whether, upon the true construction of the will, Martha Berryman became entitled beneficially to the whole of the property of the deceased; or (2) whether Martha Berryman took the whole of the said property as a trustee for the children in the said will mentioned; or (3) whether the said Martha Berryman took the said property subject only to a trust to apply thereout such portions as she in her discretion might think fit for the maintenance and advancement of the said children.

J. S. Baxter, for the plaintiff :—

The widow took an absolute beneficial interest unaffected by any trust. The words following the gift "to my beloved wife" are only expressive of the testator's motive. This is a "home-made" will, and authorities are of little use; but in *O'Brien* v. *Condon* (1) Sir Andrew Porter, M.R., says that the words "to dispose of" do not imply the absence of a beneficial interest : see his *dictum* at p. 55. The words "as she may think best" make it clear that the testator wished his wife to have everything, and also wished her to be good to the children.

W. E. Wylie, for the defendant :—

On the words of the will, whatever the testator's real intention may have been, he has given his wife no beneficial interest : *Re Haly's Trusts* (2).

(1) [1905] 1 I. R. 51. (2) 23 L. R. Ir. 130.

M. R.
1912.
Berryman
v.
Berryman.
Nov. 19.

The Master of the Rolls:—

The testator, William James Berryman, made his will, dated the 15th April, 1887, in the following words:—"I leave and bequeath all my property, chattels, money, bank shares, and my life insurance, or whatever I am possessed of or entitled to, to my beloved wife, to be disposed of as she may think best for the good of our children."

The testator died on the 17th April, 1887—two days after making his will—so that in all probability he made his will in immediate contemplation of death. He appointed no executor; and letters of administration, with the will annexed, were granted on the 15th June, 1887, to his widow.

His estate was very small. It was valued for revenue purposes at the sum of £450 gross. He left him surviving six children; and I gather that they were infants at his death. Some have since died. The survivors are all of full age.

In the month of July, 1903, the widow of the testator was committed to the Londonderry District Lunatic Asylum. On the 13th February, 1912, she was declared to be a lunatic by order of the Lord Chancellor, and by an order of the 1st April, 1912, made in the lunacy matter, Thomas J. Berryman, one of her sons by the deceased, was appointed the committee of her estate. He has taken out a summons to have the following questions determined:—(1) Whether upon the true construction of the will Martha Berryman became entitled beneficially to the whole of the property of the deceased; or (2) whether Martha Berryman took the whole of the said property as a trustee for the children in the said will mentioned; or (3) whether the said Martha Berryman took the said property subject only to a trust to apply thereout such portions as she in her discretion might think fit for the maintenance and advancement of the said children.

If I were to hold that the testator's widow was only a trustee for the children under the will, the result would be strange. It would mean that the testator, although devotedly attached to his wife, and reposing the fullest confidence in her, as the will shows, made absolutely no provision for her. It would require

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very coercive language to convince me that such was the intention.

I do not think that the language of the will necessarily bears any such construction. The terms of the devise and bequest down to the words "my beloved wife," are absolute. Do the words which follow, viz., "to dispose of as she may think best," &c., impose a trust? Do they not rather express the motive which impelled the testator to give his wife everything so that she might have the same disposing power over his estate as he himself had, knowing that she would strive to do the best for his children as he himself had done? Putting this latter construction on the will, we find nothing unlikely, nothing repugnant to fair treatment, common sense, or prudence in the disposition of the testator's estate. On the other hand, if we make the widow a bare trustee, we leave her wholly unprovided for—although described as the beloved wife of the testator—and we throw on her the obligation of administering the estate for the sole benefit of her children to her own exclusion. Further, she could be deprived of the management of the property when all the children should come of age, and be turned out of the house which was her home.

For this reason and also taking into account all the circumstances in connexion with the estate—its small value and its nature—I feel convinced that it was the intention of the testator to make his wife his substitute to all intents and purposes, and to give her full disposing power over the property just as he had it himself.

The question involved is purely one of construction, and little help is to be got from judgments on other wills. But the bequest in this case is very similar to that in *Greene* v. *Greene* (1). There the bequest was:—"To my dearly beloved wife, well knowing her sense of justice and love to her family, and feeling perfect confidence that she will manage same to the best advantage for the benefit of her children." The Vice-Chancellor, interpreting this gift, says: "He gave his property to her with no less legal power over it than he had while he lived, knowing that the same moral obligations as to the disposal of it would influence her." He held that the gift

(1) I. R. 3 Eq. 90, 629.

was absolute, and his judgment was confirmed by the Court of Appeal. I do not refer to any other decision, and I repeat the words of Lord Justice Christian when giving judgment in that case: "Bewilderment rather than enlightenment would, I fear, attend upon any effort to find a path through the tangle of decisions by which the subject is encompassed."

I answer the first question in the affirmative. This answer disposes of the other two.

[*On the request of the plaintiff's counsel, His Lordship formally answered the second question in the negative.*]

Solicitors for the plaintiff: *Venables & Byers.*
Solicitors for the defendants: *R. Simmons & Co.*

V. F. C.

CORCORAN *v.* WADE.

Poor-rate—Statutable deduction for poor-rate—Waiver for many years of right to make deduction—Mistake and ignorance of law—Presumption of lost deed.

The defendants and their predecessors in title had, since 1838, paid to the plaintiff and her predecessor in title a rentcharge of £50 Irish, charged on certain premises vested in the defendants without making any deduction for poor-rate. In 1911, the defendants for the first time claimed to make the statutory deduction for poor-rate.

Held, that mistake and ignorance of law was a reasonable explanation, and that a lost deed releasing the right to make the statutory deduction for poor-rate ought not to be presumed against the defendants.

TRIAL OF ACTION.

By an indenture, dated 1st December, 1726, William Jones (senior) assigned to trustees certain premises in Anne Street and Dawson Street, Dublin, upon the trusts therein expressed; and it was thereby provided that it should be lawful for William Jones (junior), party thereto of the third part, if he should marry, by deed or will to charge and incumber the aforesaid premises with any annuity not exceeding £50, to and for the use of the child or children of the said William Jones (junior),

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and his, her, or their issue, in such shares as he should direct and appoint.

By an indenture of settlement subsequently made and executed on the marriage of the said William Jones (junior) with Hannah Compton, the said William Jones (junior), in exercise of the power given to him, charged and incumbered the aforesaid premises with an annuity or rent-charge of £50, then currency (amounting to £46 3*s.* 1*d.*, present currency), and settled and secured the same on the issue of his said marriage. There was issue of the said marriage one child only, Rebecca Jones.

By indenture of settlement, dated 4th January, 1750, executed on the marriage of the said Rebecca Jones with Sir George Colquhoun, Baronet, the said annuity was vested in trustees for the use of the younger children of the said marriage.

The said annuity, after divers assignments for value, ultimately became vested in the plaintiff. The premises in Anne Street and Dawson Street, granted by the said indenture of 1st December, 1726, charged with the said annuity as aforesaid, were now vested in the defendants.

The said annuity had always been paid without any deduction whatsoever, other than the statutable deduction in respect of income tax.

In the year 1911, the defendants alleged for the first time that they were entitled to make a reduction in respect of poor-rate, in addition to the usual deduction in respect of income tax.

The plaintiff, alleging a lost deed executed in or shortly after 1849, wherein the persons beneficially entitled to the said premises so charged, covenanted and agreed to waive their right to make any deduction for poor-rate, brought the action for a declaration that the premises were well charged with the said annuity, and that the said annuity was payable in full without any deductions save for income tax.

The defendants by their defence denied *inter alia*, the execution of the alleged lost deed, and said that for many years after 1852 there was no person in existence competent to execute such a deed so as to bind the estate and interest of the defendants in the premises charged with the said annuity

of £50. They further said that it was owing to ignorance of law and inadvertence that the defendants and their predecessors in estate did not assert the right to make the statutable deduction in respect of poor-rate, and that on being advised that the statutory provisions authorizing such deduction were applicable to the said annuity, the defendants claimed to exercise the said right, and that in the circumstances aforesaid the execution of a deed releasing or foregoing the said statutory right of deduction in respect of poor-rate should not be presumed against them.

Jonathan Pim, K.C., and *Marnan*, for the plaintiff:—

Section 74 of the Irish Poor Law Act, 1838 (1 & 2 Vict. c. 56), enabled the occupier to deduct half the poor-rate. Section 75 enabled the middleman to make the proper deduction. Section 77 made any contract to forego the deduction void. Section 12 of the Act 12 & 13 Vict. c. 104, repealed section 77. Since then a deed, such as we ask the Court to presume, would be good. It is the duty of the Court to presume that what has been done for many years has been done of right and not of wrong: *Gibson* v. *Doeg* (1); *Tennent* v. *Neil* (2); *Dawson* v. *M'Groggan* (3). A legal origin will be presumed for what has been long acted on by the parties: *Ex parte Raymond* (4); *Hulbert* v. *Dale* (5). Where a reduced rent had been paid, the Court presumed the surrender of the old, and the grant of a new, lease: *Lefroy* v. *Walsh* (6).

G. W. Walker, K.C., and *Longfield*, for the defendants:—

Where a mistake has been made in the deduction of poor-rate it is a mistake of law: *O'Loghlen* v. *O'Callaghan* (7). In the cases cited on the other side, the Court could explain the circumstances only by a lost deed. Here the mistake was due to the parties not knowing their rights. In the present case no deed could have been executed, as the property was in settlement at the time, and since. You cannot alter the rights of parties under a deed by proof that

(1) 2 H. & N. 615.
(2) I. R. 5 C. L. 418.
(3) [1903] 1 I. R. 92.
(4) I. R. 8 Eq. 231.
(5) [1909] 2 Ch. 570.
(6) 1 I. C. L. R. 311.
(7) I. R. 8 C. L. 116.

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the parties have exercised more limited rights under the deed. The true limit to the doctrine is where there is an explanation, and where it is due to mistake: *Gardner* v. *Hodgson's Kingston Brewery Co.* (1); *Neaverson* v. *Peterborough Rural Council* (2); *North-Eastern Railway* v. *Hastings* (3).

Nov. 18.

Ross, J.:—

In this action the plaintiff claims a declaration that an annuity of £50 Irish currency is well charged on certain freehold and leasehold premises in the city of Dublin. An indenture of 1st December, 1726, contained a power authorizing William Jones, if he should marry, to charge the premises with an annuity, not exceeding £50, for the children of the marriage. By his marriage settlement, William Jones incumbered the premises with a rentcharge of £50 Irish currency, and settled it on the issue of the marriage. The issue of the marriage was one child only, Rebecca Jones. On the occasion of her marriage in 1750, the rentcharge was put in settlement. In 1782 it was again put in settlement on the marriage of her daughter. After many assignments for value, one of which was a conveyance made by the Court of Chancery in Ireland, the rentcharge became ultimately vested in the plaintiff. The premises subject to the rentcharge are vested in the defendants, and are occupied by their sub-tenants.

The validity of the charge, as a perpetual rentcharge, has been challenged in this action by the defendants. I have already decided against their contention.

The question that remains for decision is, whether the defendants are entitled to make the statutable deduction in respect of poor-rate.

In the absence of a deed, binding the defendants to pay the rentcharge over and above all poor-rate, the defendants are entitled to make the deduction. There is no such deed in actual existence. The defendants rely on the doctrine of lost grant, the deduction never having been made.

The mere fact that the rentcharge has been paid in full is not

(1) [1903] A. C. 2.9.
(2) [1907] 1 Ch. 557.
(3) [1900] A. C. 260.

sufficient to compel me to infer a lost grant. It is necessary to consider the circumstances of the case.

The Irish Poor Relief Act was passed in the year 1838. Under section 75 of that Act, a middleman in the position of the defendants is empowered to make the deduction. Under section 77, any agreement or covenant to forego the deduction is declared to be void.

This last clause remained in force till 1849, when it was repealed by 12 & 13 Vict. c. 104.

Now, how does the matter stand? There could have been no such deed from the date of the creation of the rentcharge down to 1838, as there was no poor-rate in existence. From 1838 to 1849 no valid deed could have been executed. It is only since 1849 that such a deed could have been effective. The rentcharge without deduction was paid from its creation down to the present time.

What is the proper inference to be drawn? To the ordinary mind it would appear to be plain beyond the possibility of doubt that the reason why the deduction was not made was that the party paying was not aware of his rights under the 75th section. Is there anything that obliges me to infer something different—that the middleman was aware of his right, but that by an effective instrument in writing, executed after 1849, he covenanted to give up that right?

The doctrine of lost deed is a very useful doctrine, but it must not be carried to absurd lengths. The policy of the law is to give effect to arrangements of long standing. If one party enjoys something he is not entitled to, and the other party acquiesces, the presumption that it is a matter of right should be applied to the settled practice, unless such a manner of dealing can be reasonably accounted for: *per* Lord Lindley, in *Gardner* v. *Hodgson's Brewery Co.* (1). I have nothing to add to my view of the law as reported in *Bomford's Estate* (2). A decision of Mr. Justice Cozens-Hardy, to which I referred, has been overruled on a special ground, but this does not materially affect the decision which was affirmed on appeal. I have there stated that the

(1) [1903] A. C. 229. (2) [1904] 1 I. R. 474.

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presumption can be rebutted, and the matter explained. In this case it is clear that the deduction was not made from 1838 to 1849, owing to mistake and ignorance of the section. I infer a continuance of the mistake down to the present time, which explains everything without presuming a lost deed. I am therefore of opinion that the defendants are entitled to make the statutable deduction claimed for poor-rate, and I refuse to make the declaration claimed in that respect by the plaintiff.

Solicitors for the plaintiff: *Murphy & Mallins.*
Solicitor for the defendants: *W. Howard Sanderson.*

D. M. S.

GOODISSON *v.* GOODISSON AND ANOTHER.

M. R.
1912.
July 25, 26, 27.
Oct. 30.
Dec. 3.

Will of lands—Execution—Affidavit of attesting witness—Local Registration of Title (Ireland) Act, 1891, s. 34—Power to rectify the register.

An affidavit prepared without any reference to the person who is to swear it loses much of the weight and importance it would otherwise have.

Where the surviving witness to a will had sixteen years before sworn an affidavit of due execution of the will, prepared under such circumstances, the Court nevertheless condemned the will, upon his evidence that the will had not been in fact duly executed, and that he had sworn the affidavit on the former occasion without sufficiently adverting to its contents.

Having regard to the provisions of section 34 (1) of the Local Registration of Title (Ireland) Act, 1891, the Court can, in such a case, direct the register to be rectified, where a title has been registered upon the basis of the will, which the Court condemns.

Wright v. *Rogers* (1 P. & D. 678) distinguished.

The facts in this action sufficiently appear from the judgment of the Master of the Rolls, where they are fully set forth. The action turned on the validity of an alleged will, which was the basis of the title of the defendant, Martin Byrne, as owner of the premises in remainder. The title to the premises had been registered under the provisions of the Local Registration of Title (Ireland) Act, 1891. The Reverend Mr. Bennett, the surviving witness to the will, had, on the 25th February, 1896, made an affidavit of the due execution of the will, for the purpose of having the title registered, but he now swore that his former affidavit had been made without sufficiently adverting to its contents, and that the two witnesses to the will were not present together when the testatrix executed the will.

S. L. Brown, K.C., *Herbert Wilson*, K.C., and *Hewitt Poole*, for the plaintiff :—

The case turns upon a pure question of fact. We bring the action in this division so that the onus of proof shall not lie upon us. The will cannot stand, as the witnesses were not both present in the room at the time of signing. Though the Rev. Mr. Bennett made an affidavit of due execution

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many years ago, his attention was not then called to the matter. The affidavit was not drawn from his instructions. He merely used a form sent down by the solicitor to the Land Commission. There having been a mistake, the Court has power to amend the register.

James O'Connor, *K.C.*, *Carrigan*, *K.C.*, and *D. J. O'Brien*, for the defendants :—

It is admitted by plaintiffs that their case for impeaching the registration depends solely upon mistake; fraud is not imputed.

The alleged mistake consists of the non-disclosure of the deed of the 5th December, 1890, the bond given by Martha Goodisson to Catherine and Hester Jane Goodisson of same date, and the will executed on same date by Martha Goodisson. None of these instruments could in any event affect the equities subject to which the title was registered on the 26th January, 1897, because these were equities attaching to the former tenancy, and at the date of these two instruments the fee of the premises was vested in Martha Goodisson by the Land Commission's vesting order. Therefore the application of Catherine Goodisson to discharge equities, and the proofs she furnished to the registering authorities on the 5th February, 1908, were in every respect regular; and the certificate issued, declaring the equities to have been discharged, is, apart from its statutory conclusiveness, in fact true and correct.

Nor was it a matter of mistake which can now be relied on to impeach the land certificate in its present form, finding Catherine Goodisson to be absolute owner freed from equities, that when the original application for registration of her title was made, these documents were not disclosed. As regards the bond and the will, they were not documents of title. The bond was merely a personal contract; the will was believed to have been revoked by the later will which operated to revoke all previous testamentary dispositions, and devised the lands to Catherine Goodisson, and was proved by the affidavit of the Rev. John Bennett to have been duly executed. The omission to disclose the deed of the 5th December, 1890, was immaterial, inasmuch as Catherine Goodisson proved her title *quacunque via* by the will of 23rd June, 1892; its immateriality is shown by the fact that if it were disclosed, it would not have affected the title she claimed, and would not have led to a disclosure

of the will of the 5th December, 1890, which is the document the non-disclosure of which is the mistake on which plaintiff relies to set aside the registration of Catherine's title.

"Mistake" in section 34 (1) means something more than mere error to which sub-section (2) of the section applies; it means fundamental mistake in the transaction, such as in the case of a contract would avoid it. Here all parties concerned in the registration carried out their intention of registering the title after it had been investigated in the usual way with the usual checks and precautions, and the statutory conclusiveness of the registration under section 34 is meaningless if it can be impeached on the ground of mistake (fraud being absent) owing to an error in regard to the validity of a document—the will—which was duly proved, by the customary affidavit of the attesting witness, to be a valid will. The insurance fund created by sections 92, 93, would not be necessary if the registration were impeachable in circumstances such as in the present case. The cases in which the insurance fund is made available by these sections confirm the intention of the Legislature expressed in s. 34 of making the registration conclusive except in cases of fraud or essential mistake, subject also to the safeguards required for defining boundaries by section 55 of the Act.

Then as to the facts; the will, in the absence of any evidence, was presumably well executed. A witness who has formally deposed to the validity of the execution should not be listened to retracting his evidence after the lapse of years, during which he himself dealt with the property as absolutely belonging to Catherine Goodisson, the legatee. See *Re Peverett* (1); *Wright* v. *Rogers* (2).

THE MASTER OF THE ROLLS:— Dec. 3.

This action has been brought to establish the title of the plaintiff to the remainder in fee in certain lands situate in the county Wexford expectant on the life estate therein of the defendant, Catherine Goodisson.

The lands in question were formerly held by one Ellen Dowse as tenant from year to year from Viscount Powerscourt. Being so entitled she made her will, dated 1st May, 1882, whereby she

(1) [1902] P. 205. (2) 1 P. & D. 678.

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devised and bequeathed all her property to her sisters, Martha Goodisson, the defendant, Catherine Goodisson, Elizabeth Goodisson, and Hester Jane Goodisson.

The said Elizabeth Goodisson predeceased the said Ellen Dowse, who died on the 25th December, 1889, without having revoked the will. Letters of administration, with the will annexed, were granted to the said Martha Goodisson.

Under this will, and in the events which happened, the three sisters, Catherine, Hester Jane, and Martha, became jointly entitled to the yearly tenancy in the lands.

By an indenture dated 5th December, 1890, made between Catherine and Hester Jane of the one part, and Martha of the other part, Catherine and Hester Jane, in consideration of £15 paid to each of them by Martha, released to Martha their shares and interests under the will of Ellen Dowse.

Martha thereupon became the sole owner of the tenancy from year to year.

Contemporaneously with the execution of the indenture Martha made a will whereby she devised and bequeathed all her interest in the lands to Catherine and Hester Jane, for their lives, and to the survivor during her life, and after the death of the survivor to her brother the Rev. Richard Goodisson during his life, and after his death to the plaintiff.

Martha, further, contemporaneously with the will, executed a bond to Catherine and Hester Jane in the sum of £500, to be void if Martha should not revoke the will nor alienate the lands during the lives of Catherine and Hester Jane. It does not appear why these three documents were executed. They may have been the result of purely domestic or family considerations, or they may have been caused by the desire of the landlord to have only one tenant of the lands instead of three joint-tenants. It is not necessary to inquire.

Martha was accepted as the sole tenant of the lands by Viscount Powerscourt. Hester Jane and the Rev. Richard Goodisson predeceased Martha and Catherine. The two latter lived together on the lands until the death of Martha in the month of August, 1892. Catherine was then left in sole possession.

Shortly before Martha's death she acquired the fee-simple of the lands by purchase under the Land Purchase Acts, and the fee was vested in her by order of the Irish Land Commissioners, dated 23rd July, 1891.

On this limited statement of the title it is clear that, on the death of Martha, the defendant, Catherine, became tenant for life in possession of the lands, with remainder in fee to the plaintiff. But Martha, on the 23rd June, 1892, executed a document purporting to be her last will, whereby she purported to devise the lands to Catherine absolutely. If this was a valid will, Catherine, on Martha's death, became owner in fee, with full disposing power over the lands, and the plaintiff had no interest therein whatever. The action, however, turns on the validity of this alleged will.

In continuation of the history of the title, I must next mention that Catherine Goodisson was on the 26th January, 1897, registered as the owner in fee-simple of the lands under the Local Registration of Title (Ireland) Act, 1891, subject to the rights or equities (if any) arising from the interest vested in Martha Goodisson by the vesting order of the 23rd July, 1891, being deemed to be a graft on her previous interest in the land. This registration was effected on the basis of the existence and validity of the alleged will, dated 23rd June, 1892, and the circumstances attending the registration require the closest scrutiny.

By section 22 (1) of the Local Registration of Title (Ireland) Act, 1891, the registration of the ownership of freehold land was made compulsory when the land had been at any time sold and conveyed to and vested in a purchaser under any of the provisions of the Purchase of Land (Ireland) Acts, and was subject to any charge in respect of an annuity or rentcharge for the repayment of an advance made under any of the said provisions on account of the purchase money. The lands in question came within this section, and the title thereof was therefore compulsorily registrable. By the 23rd section of the Act, where the sale had been made before the commencement of the Act, the Land Commission might, at any time, by notice in the prescribed manner, require the owner to register his ownership of the land under the Act, and thereupon, if the owner should not, within the prescribed time, make application to be registered accordingly, the Land Commis-

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sion might make application in the prescribed manner to have the ownership of the land registered under the Act. From August, 1892, when Martha died, Catherine, the defendant, was in possession and occupation of the land, and thenceforth paid the annuity payable in respect of the purchase to the Land Commission. She took no steps to register her title under the Local Registration of Title Act, and, accordingly, the Land Commission called on her to register her title. Apparently she did not comply, and the Land Commission proceeded under section 23, which I have read.

On the evidence it is sufficiently clear that the Land Commission was instructed by Catherine that she had become absolutely entitled to the lands under the will of Martha, dated the 23rd June, 1892, because a form of application to the Registrar of Titles was prepared and signed on behalf of the Land Commission seeking to have the title registered, and setting out the title of Catherine, as devisee under the said will. This application was verified by Catherine on the 5th July, 1895, and, as appears from the records of the Land Registry, came before the Examiner of Titles in the Registration office, on the 31st August, 1895, and he made the following requisition upon it—"Produce probate of Martha Goodisson's will, if proved—if not, the original." The original therefore had not at that time been produced to the Registrar of Titles. Whether it was then in the custody of the Land Commission does not appear, but it is certain that either before or after that date they procured the original from Catherine. This document has been lost, and there is no copy of it forthcoming. Its exact contents were not proved, but the trial of the action proceeded on the assumption of all parties that it purported to devise the lands to Catherine absolutely.

The requisition of the Examiner of Titles was sent to the Land Commission. It will be noted that it only required the production of the original; but the Land Commission found it necessary to give evidence of due execution. Accordingly, the Land Commission caused their solicitor to prepare an affidavit to be made by the Rev. John Bennett (whose name appeared as one of the attesting witnesses), proving the due execution of the alleged will by Martha, in his own presence and that of

Mary Dowse, both being present at the same time. This affidavit was not prepared on any instructions from the Rev. John Bennett. It was not sent by the Land Commission directly to him, but sent along with another (which merely proved the death of Martha) to Catherine, with a request that she would get it sworn. This affidavit was of course prepared in the utmost good faith, but at this stage I feel bound to make the observation that an affidavit prepared without any reference to the person who is to swear it loses much of the weight and importance it would otherwise have. This affidavit was, however, sworn by the Rev. John Bennett on the 25th February, 1896, and it must have been submitted to and accepted by the Registrar of Titles as satisfactory, because I find from the record that the requisition I mentioned was subsequently discharged, and a certificate of ownership was granted to Catherine on the 26th January, 1897, subject to the rights or equities (if any) arising from the interest vested in Martha Goodisson by order of the Land Commission, dated the 23rd July, 1891, being deemed to be a graft on her previous interest in the land, or arising in any other manner from the existence of such previous interest.

The subsequent dealings with the land are shown by the folio relating thereto in the central office of the Land Registry, and are as follows:—

On the 18th April, 1901, the Rev. John Bennett was registered as the owner of a charge on the lands for £107, and future advances not to exceed £500.

On the 5th February, 1908, Catherine Goodisson made an application to the Registering Authority, to have her title as registered discharged from equities.

The title was, in compliance with this application, investigated by the Registering Authority, and the note on the folio as to rights or equities was discharged in pursuance of a ruling dated the 4th November, 1908. For the purposes of the investigation a statement of the title of Catherine Goodisson was furnished to the Registering Authority. This statement commenced with the will of William Henry Dowse, dated 3rd May, 1876, as a root of title, by which he devised the lands to Ellen Dowse, who

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by her will, dated 1st May, 1882 (already mentioned), devised same to her four sisters, Martha, Catherine, Elizabeth, and Hester Jane. It was shown that Elizabeth and Hester Jane had died, leaving Martha and Catherine surviving, and that Martha by her will—that is the will bearing date 23rd June, 1892—had devised the lands to Catherine, who was the sole survivor.

It appears from the notes of the Examiner of Titles in the Registry office, that he was not quite satisfied that the will of Martha, dated 23rd June, 1892, gave full title to the lands, and that Catherine's title really depended upon survivorship.

The statement of title gave no information about the indenture dated the 5th December, 1890, or the will of Martha of even date.

The title as exhibited was verified by the affidavit of Catherine Goodisson, sworn on the 3rd July, 1908, in which she deposed that, to the best of her knowledge, information, and belief, all deeds, wills, instruments of title, and incumbrances affecting the title to the lands, and all facts material to that title, had been disclosed. There is no doubt that the Rev. John Bennett took an active part in the proceeding to have Catherine Goodisson's title discharged from the note in the register relating to rights and equities. It was really through his agency, and for the purpose of effecting a loan—which I will next mention—for her from the National Bank, that the note was discharged.

On the 15th July, 1909, the National Bank was registered as owners of a charge on the lands to secure all present and future advances by the Bank to Catherine Goodisson or the Rev. John Bennett, and this charge was given priority over the charge in favour of the Rev. John Bennett, which was registered on the 18th April, 1901. It will thus be seen that this gentleman was as firmly bound as man could be—both by sworn testimony and conduct—to the view that Catherine Goodisson was the absolute owner of the lands. This is a circumstance in the case which is not to be lost sight of, or to be in the least degree obscured.

The next, dealing with the title, was by a deed, dated 15th June, 1911, whereby Catherine Goodisson conveyed the lands, and all the stock and chattels therein, in trust for the defendant Martin Byrne, subject to a life interest for herself, the payment

of the debt due to the National Bank, and her other debts, and sums amounting to about £70, to be paid to certain persons named, the defendant Byrne covenanting to assist Catherine during her life in the management of the land. As the result of this deed, Catherine was registered as tenant for life of the lands, subject to the following burdens:—

"The payment of her debts, including a debt due to the National Bank; and

"The payment of other sums amounting to £70."

The folio makes no mention of Martin Byrne's estate in remainder. It is this estate which the plaintiff challenges, basing his case on the averment that the alleged will of Martha Goodisson, dated 23rd June, 1892, was not duly executed, and that the will of Martha, executed on the 5th December, 1890, was her last will.

The case is a singular one, and especially such because the plaintiff relies almost entirely on the evidence of the Rev. John Bennett.

There is another singular feature in the case. Although Catherine's title was registered on the basis that she claimed under the will of Martha, dated 23rd June, 1892, the will dated 5th December, 1890, was proved by the plaintiff on the 15th February, 1912, after citing the defendant. It will be seen later on how this was effected.

I now come to the evidence given at the trial by the Rev. J. Bennett. It is as follows:—He is the Rector of a parish near Tinahely, county Wicklow. He knew the Goodissons, who lived about five miles from him. They came to his church. He was in the habit of visiting them as a clergyman and a friend every week or fortnight. He went to their house on 23rd June, 1892. Martha was in bad health at the time, and confined to her room. She was, in fact, dying of dropsy. There were also staying in the house at the time a niece of the Misses Goodisson, named Elizabeth Dowse, who was an invalid, and her sister, Mary Dowse. The house is a two-story house, and on calling he was invited to go upstairs to see Elizabeth Dowse, who was confined to her bedroom, and in bed. He went up. At the head of the stairs there are two

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doors, one on each side, leading into two bedrooms, between which is the staircase. On the right side as you go up was Elizabeth Dowse's bedroom. He went in. She was in bed. In the room with her was Mary Dowse, and, as he recollected, Catherine Goodisson. Mary Dowse talked about Martha having made a will and left the place to William Goodisson (the plaintiff), and she said if he got it they would have no home, and they would like her to change the will. Mary Dowse had a will written out, and asked him would he go into Martha's room and get her to sign it. He did not go at once; he objected, but finally went, being urged to do so. Martha's room was at the other side of the lobby, exactly opposite. She was sitting up in the bed, propped up. He described the situation of the bed, but it is enough to say that it was in such a position that the parties in the other room could not see Martha. He told Martha that Elizabeth and Mary Dowse wanted the will changed. She understood him, and said that she had made a will and would not change it. He had the proposed will in his hand. He was alone with her. He walked out and handed the will to Mary Dowse, telling her that Martha would not sign it. They then talked the matter over. They said, if he could not get the matter done, nobody could. He thought this was said by Mary Dowse. Catherine was present. He was persuaded to try again. He went back to Martha. She was in the same position and very feeble. He went alone and no one else was in the room. He told her they would like her to sign the will, as they wanted to have a home. She yielded, and signed. He believed that he brought in a pen and ink on both occasions. She signed the document. She did not read it. He did not read it for her. He signed it himself immediately after her. He then walked back with it to Miss Dowse's bedroom; the doors were open. When he went back Mary Dowse was at the top of the bed-room (the witness meaning by this, that Mary Dowse was in such a position in the room that she could not have seen the testatrix). He also stated positively that Mary Dowse could not possibly have seen her sign the will. He did sign the document himself in the presence of the testatrix immediately after she signed it, and at her bedside. When he left the testatrix's bedroom and went into the other, he handed the document to

Mary Dowse. That completed the transaction. This was the Rev. John Bennett's direct evidence. He was severely, but very properly, and with great ability cross-examined by Mr. James O'Connor. The witness stated to him that he had no interest in the case. He disclaimed the suggestion that he was prompted to take the part he was then taking by any preference for the plaintiff over the defendant Byrne because the former was a Protestant and the latter a Catholic. The witness was asked as to his previous career. He said he had been in business in early life—from 1868 to 1880—and had a judgment marked against him when so engaged. He entered holy orders in 1880. He knew the plaintiff well. He was not very clear as to the exact circumstances which caused him to give information to the plaintiff that the will was not properly executed, but I interpreted his evidence in cross-examination as meaning that, when it became known that Catherine had assigned the farm to the defendant Byrne, talk arose as to the right of Catherine to leave it away from the family, that his mind was thus cast back to the execution of the will, that some parties, other than the plaintiff, had said that both witnesses should see the will signed by a testator, and having been so told, he remembered that Mary Dowse was not present. He afterwards informed the plaintiff of this on meeting him in Dublin, the plaintiff having complained rather bitterly of the assignment to Byrne, thus cutting the plaintiff out. This I understood to be the substance of the plaintiff's evidence. He was cross-examined as to his knowledge in the year 1892 about the formalities necessary to due execution of the will. He admitted that he knew a will required two witnesses, but he thought it all right when they were "all there." His general state of knowledge was, that there should be two witnesses. He admitted having taken an active part in getting the title discharged from equities, but his attention was not directed to the necessity for both witnesses to be present. The witness was confronted by his affidavit verifying the due execution of the will. He thought it came by registered letter to himself. He thought there were two sent. (The witness appears to have been right in this, as the affidavit first sworn by the witness was in some way informal and it had to be re-sworn.) He did not remember that the will

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was attached. (It was in fact attached.) He looked at the affidavit before he swore it. He recognized the seriousness of an oath. He thought that the affidavit was all right, as they were all there at the same time, saying that Mary Dowse was "at home." He said that Catherine Goodisson was upstairs at the time. The witness in reply to some questions put by myself gave a most particular description as to how the will was executed. He went into the room with pen and ink in hand, having the will with him. It was on a sheet of letter paper. Martha was propped up in bed. He handed her the pen first. He dipped the pen in the ink-bottle which was in his hand. The letter paper was on the bed. He laid his hand under the letter paper and she signed. It was a thick double sheet, as easily written on as on a notebook. He had laid the ink-bottle on a table near the bed.

The only other oral testimony as to what occurred on the day of the execution of the will was that of Catherine Goodisson. She is eighty-six years of age, and was examined on commission. The material part of her evidence is that she knew the Rev. John Bennett for twenty years; that he was not her parish clergyman, but a friend; that she remembered that he was present at the making of the will; that Martha was an invalid in dropsy; that Elizabeth and Mary Dowse were in the house; the former being an invalid having the attendance of a nurse; that when Martha made the will her mind was quite well, and that she, Catherine, must have been downstairs when the will was made. She afterwards said positively that she was not upstairs when the will was made. She said that Mary Dowse never spoke to her about having prepared a will. She went up after the will was made and said to Martha:—"I am sorry for what's done. Did you think bad of it?" She said, "No, Kitty, I know you should have done it." The witness afterwards said she was not sure she was not in her niece's bedroom when the will was signed, that she was not upstairs at all, and at the time she thought she was "crying for them doing it." She afterwards said that it must have been Mary that drew the will, and that she, Catherine, saw it before Martha signed it, She says nothing about the mode of execution.

Mr. James Henry, solicitor, was called as a witness by the defendants, and proved that the Rev. J. Bennett took an active

part in procuring the discharge of the note as to equities on the Register of the Title.

The above, along with the documents which I have referred to, is all the important evidence in the case.

Strong reliance was placed by the plaintiff on the fact that the defendants allowed the plaintiff to prove the will of Martha Dowse, dated 5th December, 1890; but I do not attach importance to this. The defendants, in face of the attitude of the Rev. J. Bennett, would have been placed at a great disadvantage in the Probate Division, and it was fair tactics to force the plaintiff to try the validity of the will of the 23rd June, 1892, in this action, relying on the fact that it was the title to real estate which was affected.

I am now confronted by the question, whether I can act on the evidence given in this action by the Rev. J. Bennett, and throw over the evidence of his affidavit made nearly seventeen years ago, and his subsequent conduct in connexion with the title. That evidence, as Mr. O'Connor rightly urged, is tainted with infirmity. It is contradicted by his evidence on oath given sixteen years ago, about four years after the transaction. It is inconsistent with his conduct in the years 1901, 1908, and 1909.

I was pressed by counsel for the defendants to disregard the evidence of the Rev. J. Bennett. They urged that such evidence cannot be safely acted on, and that all the circumstances precluded me from acting on it. I yield to this contention, so far that Mr. Bennett's evidence must be received with the utmost caution, and even regarded with suspicion; but still the question remains whether, after taking all proper safeguards, I am to believe him. I do not think that any decided cases establish the proposition that the evidence of a witness to a will is to be absolutely rejected because it contradicts what he has previously sworn. *Wright* v. *Rogers* (1) was a case in which the Court decreed probate of a will notwithstanding the sworn testimony of the surviving witness. But there were very good reasons for rejecting his evidence. The will had a full attestation clause. It was executed in the presence of an experienced attorney and his clerk, the surviving witness

(1) 1 P. & D. 678.

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referred to. In consequence of certain interlineations appearing on the face of the will, an affidavit was required from one of the attesting witnesses before probate could issue. Accordingly a printed form of affidavit was obtained which was filled in by the clerk, and sworn by the solicitor who was the other witness. This affidavit contained the usual clause, "we thereupon attested and subscribed the said will in the presence of the said testator." The solicitor died about a year afterwards, and after his death the clerk for the first time gave information that the will was not signed by the witnesses in the presence of the testator. The Court, relying on the facts that the will was executed in the presence of two witnesses, an attorney of long experience, and his clerk, and that the will had a full attestation clause, and that the clerk during his master's life never raised any question about the due execution, and prepared the affidavit referred to, rejected his evidence. The Court did not, in fact, believe it. Lord Penzance said—"Taking all the circumstances into consideration, I have come to the conclusion that the will was well executed." Likewise, in *Myers* v. *Gibson* (1), the Court believed that the evidence against the will was false. So, too, in *Clery* v. *Barry* (2), Palles, C.B., says, at p. 170, "In my opinion, we are bound to form, as best we can, our own opinion upon the credit to be attached to the evidence of each witness." Keeping then this question before me—Was the will duly executed?—I proceed to examine the evidence *pro* and *con*, giving all consideration to the legal presumption in favour of due execution.

I must, however, commence by saying that the presumption in this case is of the most shadowy description. The testatrix was an old lady dying of dropsy. It was not pretended that she had any experience in the execution of wills. There was no professional gentleman present to look after the execution. The will was not prepared by a professional person. It was in fact prepared by a young lady, and in a very irregular way; and it was presented to the testatrix under such circumstances as were not conducive to attention to formalities. Indeed the circumstances were such that one would feel rather surprised if everything was proved to have

(1) 14 W. R. 901. (2) 21 L. R. I. 152.

been done with regularity and formality. So much for the presumption in favour of due execution. Now let us come to the evidence. There is no doubt that the affidavit of due execution made by the Rev. J. Bennett on the 25th February, 1896 (nearly four years after the will was made), is a fact of the utmost importance. Sworn testimony cannot be easily set aside by contradictory testimony given by the same person sixteen years after; many considerations make the later evidence valueless under ordinary circumstances. But I have to consider all the circumstances. I have, in the first place, to consider the character of the witness, and his relation to the case. He is a clergyman of the Church of Ireland, holding the responsible and very respectable position of rector of a parish. He must, when coming into Court to swear that what he had sworn sixteen years before was untrue, have been conscious that he was about to make a very humiliating confession, and I cannot conceive any impelling motive in him to give evidence at the trial, other than a conscientious determination to undo the wrong which was caused by his own previous mistake. He had no material interest to serve, and I reject altogether the suggestion that the part which he has taken is to be explained by a desire to keep a Catholic out of the farm, and put a Protestant into it. So far from his having any interest in disturbing the defendant's title, his interest was the other way, because he had a charge upon the lands depending for its validity on the absolute ownership of Catherine Goodisson, on the death of Martha.

So much then for the personal position of the Rev. J. Bennett. I now come to deal with his affidavit. I doubt very much if it would be at all possible to get over it, if it had been prepared, as every affidavit should be prepared, viz., on the direct instructions of the person who was to make it. But Mr. Bennett gave no instructions for the affidavit. It was prepared and engrossed in the office of the Land Commission without any communication with him. It was not even sent to him directly. It was sent to Catherine Goodisson, and by her forwarded to him to be sworn. He swore it certainly; but I cannot but think that an affidavit prepared and presented in this way loses much of the weight which an affidavit ought to have. Further, I can

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conceive a not very accurately minded man not realizing the full meaning of that portion of the affidavit which described the mode of attestation. He said in his evidence that he thought it was all right when they were "all there." He knew that two witnesses were essential, and his attention was not called to the fact that the two witnesses should sign in the testator's presence. I find no great difficulty in believing a witness who says that he did not thoroughly understand such an affdavit, if the witness presents the appearance of a truthful witness, and I find no corrupt or improper purpose which he was to serve by giving false testimony.

It was argued with very great force that without imputing perjury to the Rev. John Bennett, I ought to reject his evidence, given after a lapse of twenty years from the events deposed to, where it is directly at variance with the evidence given only four years after their occurrence. I have given the utmost attention to this aspect of the case; but having heard the Rev. John Bennett's evidence, and bearing in mind its very positive character, I cannot get over it by attributing to him any lapse of memory. He was either telling the truth or committing perjury. In my opinion, he told the truth.

There is only one other living witness of the events of the day of the execution of the alleged will, viz., the defendant, Catherine Goodisson. She does not contradict him on any material point, while there is much in her evidence to corroborate his story.

For the above reasons I find that the alleged will of Martha Goodisson bearing date the 23rd June, 1892, was not duly executed, and that her last will was the will dated 5th December, 1890, which was proved by the plaintiff on the 15th day of February, 1912.

But it was argued that I cannot give any effect to any such finding because the register under the Local Registration of Title (Ireland) Act, 1891, is conclusive. This, however, ignores the jurisdiction reserved, rather than given by the 34th section, which provides that nothing in the Act shall interfere with the jurisdiction of any Court of competent jurisdiction based on the ground of actual fraud or mistake, and that any such Court may,

upon such ground, make an order directing the register to be rectified in such manner and on such terms as it thinks just. I therefore consider that this Court has ample jurisdiction to direct the register of the title in this case to be rectified.

The judgment will be in the form of a declaration that the will of Martha Goodisson dated 5th December, 1890, was her last will, and that the plaintiff on her death became by virtue of the said will and the indenture bearing even date therewith, and set out in the 6th paragraph of the statement of claim, entitled in fee to the lands mentioned in the statement of claim, subject to the life estate therein of the defendant Catherine Goodisson—a declaration that the indenture dated the 15th June, 1911, mentioned in the 16th paragraph of the statement of claim, is void so far as it purports to convey any estate to or for the benefit of the defendant Martin Byrne; and an order that—the plaintiff waiving all claim to set aside or impeach the several charges entered on the folio No. (Local office, 718; Central office, 22692) or any of such charges—the register of such folio be rectified in accordance with the declaration aforesaid, saving, however, the rights of all parties interested in the burdens appearing in said folio.

The defendants must pay the plaintiff's costs—including costs of the commission. I allow costs of discovery.

Solicitor for the plaintiff: *M. Lane Horan.*
Solicitors for the defendants: *M. J. O'Connor & Co.*

A. E. C.

Barton, J.
1912.
Nov. 9, 12.

CREED *v.* CREED.

(1911. No. 650).

Practice—No title at date of issue of writ—Subsequent acquirement of title—Amendment of writ.

A B, believing that X died intestate, took out administration intestate to him, and commenced an action as such administrator against C D. C D, who had been aware that X left a will, appointing him executor, declared that fact for the first time in his defence, and thereupon A B took out administration with the will annexed (C D having renounced), and sought to amend the pleadings accordingly.

Held, that A B's application must be refused, as at the date of the issue of the writ she had no title to sue.

Summons, on behalf of the plaintiff, for an order that the title of the action might be amended by describing the plaintiff as "Mary Creed, administratrix with the will annexed of John Creed, deceased," instead of "Mary Creed, administratrix of John Creed, deceased," and that the statement of claim might be amended by pleading that the said John Creed made a will, and that administration with the said will annexed was granted to the plaintiff, and that she sued as such administratrix.

The facts were as follows:—The plaintiff commenced an action in the Chancery Division by writ dated 10th August, 1911, claiming a declaration that a certain document dated 26th May, 1900, and made between John Creed of the one part, and Jeremiah Creed of the other part, which purported to be an absolute assignment of certain lands, was in reality a mortgage to secure the payment of certain moneys due by the said John Creed to the defendant, and for an account of the amount due thereon, and of the rents and profits of the lands received by the defendant, and for a reconveyance, if it were found that all sums so due had been received. The defendant had entered into possession of the lands on the execution of the assignment, and had so continued till the date of the summons.

The said John Creed died on the 24th April, 1906, and his widow, the plaintiff, believing that he died intestate, took out administration intestate to him on 20th July, 1911, and on 10th August, 1911, issued the writ in the action as such administration. A statement of claim was delivered, and the defence filed in reply pleaded *inter alia* that the deceased made a will, dated 19th February, 1898, whereof he appointed executors.

Jeremiah Creed, the defendant, and Daniel Creed, the executors appointed thereby, not applying for probate, the plaintiff obtained administration with the said will annexed on 16th September, 1912, the former grant to her being recalled, and now sought to amend her pleadings in accordance with these facts.

J. F. Moriarty, for the plaintiff :—

This amendment has been rendered necessary by the wrongful act of the defendant in suppressing the will of John Creed till after action brought.

William S. Norwood, for the defendant :—

The grant of administration to the plaintiff was void, because a will which appointed executors was in existence, even though they had not taken out probate, and did not after take out probate: *Graysbrook* v. *Fox* (1); *Abram* v. *Cunningham* (2); *Woolley* v. *Clark* (3); *Fitzpatrick* v. *M'Glone* (4). Therefore the plaintiff had no title to sue when the action was brought. If a plaintiff has no title to sue when the writ was issued, he cannot maintain his action by subsequently acquiring a title and amending the suit accordingly: *Evans* v. *Bagshaw* (5); *A.-G.* v. *Avon Corporation* (6). Further, this amendment may prejudice the rights of the defendant. He has, or may have, acquired a title to the lands under the Statute of Limitations, since the commencement of the suit, in addition to his other defences; and if the amendment were allowed, he would be deprived of this plea: *Weldon* v. *Neal* (7); *Hudson* v. *Fernyhough* (8).

(1) Plowden, 276.
(2) Levinz, Pt. 2, 182.
(3) 5 B. & Ald. 744.
(4) [1897] 2 I. R. 542, at p. 545.
(5) L. R. 5 Ch. 340.
(6) 3 De G. J. & S. 637.
(7) 19 Q. B. D. 394.
(8) 61 L. T. (N. S.) 722.

Barton, J.
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J. F. Moriarty, in reply :—

The defendant fraudulently suppressed the will, and allowed the plaintiff to take out administration, and bring the action on that basis. A Court of Equity should not listen to a suitor who, as here, is in effect setting up his own fraud. Fraud is a good answer to a plea of the Statute of Limitations.

BARTON, J. :—

I am of opinion that this summons should be dismissed with costs, as the plaintiff's letters of administration were void *ab initio*; and she had no title to sue when the action was brought. I shall, however, look more carefully into the papers, and the cases which were cited, before the order is made up. [His Lordship afterwards (Nov. 12th) intimated that he remained of the same opinion.]

Solicitor for the plaintiff: *C. W. Ashe.*
Solicitor for the defendant: *T. P. Grainger.*

E. C. F.

Appeal.
1912.
Oct. 31.
Nov. 1, 4.

PATRICK FARRELL *v.* ELLEN DONNELLY, JOHN DONNELLY, PATRICK DONNELLY, AND ELLEN DONNELLY (1).

Partition Acts, 1868 (31 & 32 *Vict. c.* 40), *s.* 3; 1876 (39 & 40 *Vict. c.* 17), *s.* 7—*Jurisdiction of Chancery Division and County Court—Tenant purchasers—Vesting order registered subject to equities—Annuity to Land Commission in existence—Tenancy in common in purchased holding—Judgment registered as mortgage against interest of one of several co-owners—Equity civil bill seeking sale in lieu of partition—Consent of Land Commission to partition whether a condition to a decree for sale—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 30, (1) *a*—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 54, (1) (*a*).

A judgment mortgagee of the share of one of several co-owners of a holding, purchased under the Land Purchase Acts subject to an existing annuity payable to the Land Commission, may obtain, under the Partition Acts, an order for sale of the whole without the consent of the Commission to a partition.

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

CASE STATED by Wright, J., at the Longford Summer Assizes, 1912, on a civil-bill appeal by the plaintiff against an order of the County Court Judge, dated 21st June, 1912.

The plaintiff obtained judgment on the 17th July, 1911, against the defendant, John Donnelly, and registered the same as a mortgage against the interest of the said defendant in the lands of Cloonfore, in the county of Longford, for the sum of £85 16*s*. These lands were formerly the property of James Donnelly, late husband of the first-named defendant, Ellen Donnelly, and father of the three other defendants, as tenant to the Earl of Granard. He died more than twenty years ago intestate, and his widow and children, as his next-of-kin, continued in possession of the lands. In 1892 the widow, Ellen Donnelly, purchased the lands of Cloonfore through the Irish Land Commission subject to an annuity of £7 19*s*. 6*d*. payable to the Commission, and she was registered as owner thereof subject to equities.

The plaintiff issued a civil bill stating that the said sum of £85 16*s*. was due to him on foot of the said judgment mortgage, that the Donnellys were in possession of these lands and were entitled to the same undivided shares as tenants in common, the defendant John being entitled to two undivided ninths of the said lands, and that a sale would be more beneficial to the parties interested than a division; and the civil bill accordingly sought for a sale of the lands. No consent of the Land Commission to a partition or sale had been obtained.

On the hearing of the civil bill the County Court Judge made an order adjourning the case to the following sessions, with liberty to the plaintiff to amend by seeking a partition. From this order the plaintiff appealed to the Judge of Assize, Wright, J., who, being of opinion that an order for sale should be made, ordered a sale accordingly, but, at the request of the defendants, stated the present case.

In the case his Lordship stated that he was of opinion that the jurisdiction of the Court to order a sale was alternative or supplementary to the jurisdiction to decree partition, that the jurisdiction to sell was independent of the jurisdiction to partition, and could be exercised without the consent of the Land Commission.

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The question reserved for the Court was: "Whether, under the circumstances of this case there was jurisdiction to order a sale of the lands, no consent by the Land Commission to the partition of the lands having been obtained?"

Wylie, for the appellants:—

The question arising in the present appeal is: Whether, where a person has purchased his holding under the Land Purchase Acts, subject to an annuity still existing and payable to the Land Commission, and the land becomes vested in several co-owners, any one of them or his incumbrancer can have a sale under the Partition Acts in lieu of a partition, without the consent of the Land Commission? This power of sale is given by the Partition Act, 1868 (31 & 32 Vict. c. 40), section 3: "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then, if it appears to the Court that . . . a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may . . . direct a sale of the property." The jurisdiction hereby given is limited to cases in which "a decree for partition might have been made." But by the Irish Land Act, 1903, section 54 (1) (*a*), any holding purchased by an advance from the Land Commission Court cannot be subdivided without the consent of the Land Commission. This was only a continuance of similar antecedent legislation throughout all the Irish Purchase Acts, commencing with the Bright clauses of the Landlord and Tenant Act, 1870, section 44 of which prohibited subdivision without the consent of the Board of Public Works while any part of the annuity payable to them remained unpaid, on pain of forfeiture. Then in the Land Law Act of 1881, expanding the germs of the earlier statute, we have analogous provisions in section 5 (3) as regards a judicial tenancy, and in section 30 (1) *a* as regards a tenant-purchaser.

In *O'Kane* v. *Burns* (1) this Court held that a sub-lease by a judicial tenant without the landlord's consent was absolutely void under section 5 (3) of the Act of 1881. By parity of reasoning a subdivision without consent, prohibited in the same line of the

(1) [1897] 2 I. R. 591.

sub-section, would be also void. A similar result must follow in cases of subdivisions contrary to section 30 (1) *a* of the Act of 1881, or to section 54 (1) (*a*) of the Act of 1903. Therefore partition, which involves subdivision, cannot be validly made without the necessary consent.

As to how far section 54 of the Act of 1903 affects the power of a County Court to direct a sale under the Partition Acts in cases like this without the consent of the Land Commission there seems to be a diversity of practice: see Osborne's County Court Practice (2nd ed. by Babington), p. 202.

But the question is really one of jurisdiction. There does not appear to be any decision of the High Court on the point.

Leave to sell in lieu of partition where the landlord's consent had not been obtained was refused by His Honour Judge Cooke in *Roper* v. *Roper* (1), following the view expressed by the Lord Chief Baron in *Tench* v. *Glennon* (2) on a civil-bill appeal. The procedure in the County Court as to consent to partition when such consent is necessary is regulated by Order XXXI, Rule 2.

D. S. Henry, K.C., and *E. S. Murphy*, for the respondent:—

Restrictions of this kind upon dealing with property, however binding they may be as between lessor and lessee, do not apply where a lawful incumbrancer of the tenant is seeking to realize his security: *Ex parte Domville*; *In re Fowler* (3). There it was held that an equitable mortgagee of a lease, subject to a covenant against alienation without the landlord's consent, was entitled to have a sale in the Landed Estates Court, notwithstanding the landlord's objection. Brady, L.-C., says, p. 21:—"A deposit of title-deeds must therefore, not being prohibited, be considered to be allowed by the lease, and allowed with all its legal and equitable consequences, that is to say, with the power of having a sale effected through the medium of this or any other Court possessing equitable jurisdiction"; *Hilton* v. *Tipper* (4); *Sinclair* v. *James* (5). "Any suit in which a partition might be made" means "any partition suit": *Pryor* v. *Pryor* (6).

(1) 41 Ir. L. T. R. 231.
(2) 34 Ir. L. T. R. 157.
(3) 14 Ir. Ch. R. 19.
(4) 16 W. R. 888.
(5) [1894] 3 Ch. 554.
(6) L. R. 19 Eq. 595, per Bacon, V.-C., p. 598.

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Section 44 of the Landlord and Tenant Act, 1870, came directly under the consideration of this Court in *In re Flood's Estate* (1), on appeal from the decision of Ormsby, J., which was affirmed, holding that the judgment mortgagee of the interest of a tenant-proprietor, subject to a Board of Works annuity, was entitled to realize his security by a sale in the Land Judge's Court without the consent of the Board, but subject of course to the annuity. In that case the Board objected to a sale, except upon terms as to safeguarding their rights, which the petitioner was not willing to concede. FitzGibbon, L.J., in the course of his judgment at p. 552, said :— "I do not consider that a sale through the Landed Estates Court on foot of a registered judgment is an alienation or assignment made in contravention of the Land Act, 1870, section 45, which seems to contemplate voluntary assignment; and I think that in the corresponding statute, 35 & 36 Vict. c. 32, the words 'assignment' and 'alienation' have the same restricted meaning. But, however this may be, I do not believe that either Act has the effect, which counsel for the Board of Public Works here in substance contended, of placing the holdings of tenants who have become proprietors by the aid of public money beyond the reach of their creditors—and above the law which generally makes men's property available for the payment of their debts—so long as any part, however small, of the Government loan remains unpaid."

Section 30 (1) *a*, *b* of the Act of 1881, and section 54 (1) (*a*) of the Act of 1903, expressly apply only as between the Land Commission and the purchasing tenant. The Land Commission are the only persons who can take advantage of a breach of the statutory condition; and the penalty is not forfeiture of the land or avoidance of the sub-division, but power for the Land Commission to sell in order to secure a single person responsible to the Commission: *In re Roulston* (2); *National Bank* v. *Diffely* (3).

The County Court has full jurisdiction in partition cases where the prescribed value is not exceeded: County Courts and Officers (Ireland) Act, 1877 (40 & 41 Vict. c. 56), section 33.

Under the Partition Act of 1876 (39 & 40 Vict. c. 17), section 7, where a sale is desired a partition need not be prayed.

(1) 7 L. R. I. 545. (2) [1909] 1 I. R. 306. (3) [1910] 1 I. R. 271.

Wylie, in reply :—

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The judgment mortgagee cannot be in a better position than the co-owner whose interest the judgment affects : *Eyre* v. *McDowell* (1). His only remedy would be to sell the undivided share. *In re Flood's Estate* (2) was a case in which it was sought to sell under the Landed Estates Court Act, which enabled the annuity to be left charged on the lands. Here the County Court Judge could not have made an order for partition (*O'Kane* v. *Burns* (3)), and therefore he had no jurisdiction to order a sale.

Henry, K.C., cited *Kennelly* v. *Enright* (4).

THE LORD CHANCELLOR :—

Nov. 4.

This case has been stated by Mr. Justice Wright in order that the question decided by him should be further examined regarding the jurisdiction of the Court to order a sale of the lands in discussion, without having obtained the consent of the Land Commission. As pointed out by the learned Judge, the question is one of great importance. It is unnecessary to specify the fact in detail ; the case stated itself, with the documents incorporated, adequately state them.

The lands known by the name Cloonfore, containing, as I gather, 35 acres in all, are situate in county Longford. Mrs. Ellen Donnelly since her husband's death purchased as his administratrix the lands under the Land Purchase Acts, and she has been registered as owner, subject to equities, under the Local Registration of Title Act of 1891. The husband died intestate, and the defendant John Donnelly was beneficially entitled to two undivided ninth parts of the lands. The plaintiff having recovered a judgment against the said defendant, and having duly registered it, in a suit for the purpose brought by the plaintiff in November, 1911, it was declared that the judgment mortgage was well charged upon John's interest in the lands. The annuity in respect of the advances made by the Land Commission is still outstanding, and the objection to Mr. Justice Wright's decision is based

(1) 9 H. L. C. 619.
(2) 7 L. R. I. 545.
(3) [1897] 2 I. R. 591.
(4) 8 L. R. Ir. 33.

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on the argument that no partition could be made of the lands without the consent of the Land Commission. The consent not having been obtained, it was contended that the learned Judge had no authority to make the order he did make for the sale of the lands on the application of the plaintiff as a judgment mortgage of John's interest.

The Equity Civil Bill produced before us made the case that in the circumstances the Court should make an order for the sale of the lands as being more beneficial for all the parties interested, rather than that there should be a division of the lands. The plaintiff's claim, accordingly, was that an order for sale should be made—the proceeds to be equitably divided amongst the persons interested. The County Court Judge, as I infer, adjourned the hearing of the Equity Civil Bill to enable an amendment to be made in the Equity Civil Bill, but the plaintiff appealed to the Assizes at which the order now under discussion was made by Mr. Justice Wright.

Mr. Wylie, counsel for the defendants, has urged that there was no jurisdiction to make the order for sale, and after an evidently careful consideration of the law on the subject, the learned Judge held that, on the facts, the circumstance that the Land Commission's consent had not been obtained for the partition of the lands in no way impeached the authority of the Court to order a sale.

The case is not conversant with any person occupying the position of a tenant from year to year, or of a tenant for a statutory term under the Land Acts. Mrs. Donnelly is the registered owner of them in fee-simple, subject to the equitable interests existing in them. Mr. Wylie could not, with any effect, dispute the plaintiff's power by duly registering his judgment against the defendant John, to acquire a valid judgment mortgage against his interest in the lands. That the judgment mortgage was valid is indisputable; and under the Judgment Mortgage Act, 13 & 14 Vict. c. 29, s. 7, the creditor having duly registered his judgment in respect of John's interest, thereby acquired all such rights, powers, and remedies whatsoever, as if an effectual conveyance, assignment, or assurance to such creditor of all his estate or interest had been made and

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executed by John Donnelly. There is then no question that the plaintiff has acquired the full interest of John Donnelly, no doubt subject to redemption; and the important public question raised is obvious, namely whether, in the case of holdings so vested in the former tenants or their representatives, and held under vesting orders duly registered, with the usual annuity payable to the Land Commission upon their advance, it is or is not possible for the judgment creditor to take any step to realize the debt due to him. Section 30 of the Land Law (Ireland) Act, 1881, as I interpret it, has nothing in it to disparage, much less to vitiate, the plaintiff's judgment mortgage, and nothing to qualify the effect of section 7 of the Judgment Mortgage Act, already quoted. Neither does section 54 (3) of the Irish Land Act, 1903, in any way qualify or invalidate a judgment mortgage effected as in the present case. Mr. Justice Wylie's judgment in *Re Roulston* (1) is an express decision to that effect. Indeed through the whole extent of our land code there is nothing whatever modifying or reducing in any degree the privileges and powers of the judgment mortgagee. I do not pause to consider the argument raised by Mr. Wylie on the provisions of sections 2 and 5 of the Land Act of 1881. They refer and are confined, so far as they go, to tenants from year to year, and to tenants holding during the continuance of statutory terms, and have no relation whatever to the proprietors of purchased lands. No flaw can be attributed to the plaintiff's title.

The plaintiff in this case is making no attempt to have the purchased lands sub-divided, and in no way is offending against any obligation due to the Land Commission. His Equity Civil Bill did not pray for an order for partition, but, on the contrary, for a sale of the lands. The terms of the Partition Act, 1868, have been much relied on by Mr. Wylie. In sections 3 and 4, the introductory words in both cases are: "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made," then in the conditions stated, the Court would have the power to order a sale of the property, and a distribution of the proceeds, instead of a sub-division of the land among the parties interested therein. I by no means desire to be taken

(1) [1909] 1 I. R. 306.

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as now assenting to the construction placed by Mr. Wylie on these introductory words. Assuming that, on the terms of the Act of 1868, the consent of the Land Commission was required for a partition order, I know of no reason for believing that their consent would not be given. Nor do I agree that it was a necessary condition of jurisdiction to entertain the case. The Court under section 33 of the County Courts (Ireland) Act, 1877, possesses, in proceedings within the scope of that section, all the powers and privileges of the High Court of Chancery. If the application then were, in fact, for a partition, and an order to that effect was contemplated, the Court would appear to have the power of having the views of the Land Commission duly ascertained. But partition was not sought; and it plainly was not, by reason of the amendment made in the Act of 1868 by the Partition Act, 1876, under section 7 of the latter Act, which provided as follows: "For the purposes of the Partition Act, 1868, and of this Act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition."

I agree with the order of the learned Judge. The appeal accordingly should be dismissed with costs.

HOLMES, L.J.:—

The question for consideration is whether the Judge of Assize, hearing an appeal from the equity side of the Civil Bill Court, has jurisdiction to decree the sale of certain lands of which the applicant is only owner of an undivided share.

Ellen Donnelly's husband was tenant of the lands of Cloonfore, when he died more than twenty years ago, leaving three children, who, with his widow, have since lived on the lands, which were bought under the Land Purchase Acts, the widow having been registered under the Local Registration of Title Act as the owner subject to equities.

It is admitted that when this litigation began, subject to the annuity payable to the Land Commission, the widow was entitled beneficially to three-ninths of the lands, and each of

the three children to two-ninths of the lands as tenants in common in fee-simple. The plaintiff had obtained a judgment mortgage against the share of John Donnelly, one of the sons, and has taken these proceedings to obtain a sale of all the lands; but as I am not prepared to hold that he has any greater right than his judgment mortgagor would have, I deal with the case as if there was no mortgage, and John were himself the plaintiff, applying for an order to sell.

Ownership of lands by two or more persons in undivided shares is an unsatisfactory kind of tenure; and there has always existed judicial machinery by which one of the owners could obtain a division. This could have been enforced by judgment at Common Law; but the usual procedure for the purpose has been a suit for partition in the Court of Chancery. This often proved a most expensive and intricate remedy; and I remember the satisfaction of the legal profession on the passing of the Partition Act, 1868, by which power is given to the Court, upon the request of any interested party, to order a sale of all the lands, instead of a division thereof, when that course appears to the Court the more beneficial.

Now, let me take the case of three or four persons seised in fee-simple of landed property in certain undivided shares as tenants in common, or as joint-tenants, subject to an annuity or rentcharge not arising under, or in any way connected with, the Irish Land Purchase Acts. Would the existence of such annuity or rentcharge prevent one of the owners from applying to the Chancery Division, or to the Civil-bill Court, if within its jurisdiction, to partition the lands? I cannot conceive any legal principle that could be relied on to defeat an action of this nature on this ground; nor have we been referred to any authority in support of such a contention. Indeed, if I followed Mr. Wylie's argument aright, he admitted that in such circumstances the usual proceedings for partition or sale could be taken. When a partition is carried out, each owner is given a specific portion of the lands instead of an undivided share thereof; but an annuity or rentcharge charged on all the lands need not, and ought not, to be affected thereby. The person entitled thereto retains every remedy which he had before for enforcing his right, and all the liabilities

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of the owners in relation to such right continue. It follows from this proposition, if it be sound, that the present case comes within it, unless the fact that the fee-simple has been acquired under the provisions of the Land Purchase Acts makes a difference.

This is a narrow, although important, question ; and I do not propose to discuss any other. It turns upon section 30 of the Land Law (Ireland) Act, 1881. Other provisions of the Land Purchase Code have been referred to, but only by way of illustration ; and if this section does not sustain the appellant's contention, I am of opinion that it must fail.

The object of the enactment is to annex certain conditions to land sold under the Act while it is subject to any charge in respect of an annuity in favour of the Land Commission ; and passing over for the moment the introductory words, sub-section (1) *a* provides that the "holding shall not be subdivided or let by such proprietor without the consent of the Land Commission until the whole charge due to the Land Commission has been repaid." The case has been argued by Mr. Wylie as if these words stood alone and without any qualification ; and if this were so it is possible that his inference would follow—namely, that partition would be thereby absolutely forbidden, and that as there could be no partition there could be no sale in lieu of partition under the Act of 1868. The fallacy, however, is that there is a distinct qualification to be found in the words that begin and govern the entire section—"As between the Land Commission and the proprietor for the time being of any holding for the purchase of which the Land Commission have advanced money, the following conditions shall be imposed so long as such holding is subject to any charge in respect of an annuity in favour of the Land Commission." The subdivision forbidden in sub-sect. (1) *a* is only forbidden in so far as it would affect in any way the Land Commission or the annuity payable thereto. This is the only meaning that I can attach to the introductory statement. If the four owners in this case agreed to divide lands into four distinct parts, and each to take possession of one of them instead of his previous undivided share, would such an agreement be illegal as between them ? and after it had been entered into and acted on, could it be disregarded by any of them ? I think not ; and I am

also of opinion that if there could be a division by agreement, there also could be in theory a partition by suit—I say "in theory" because any Court, having regard to the power given to the Land Commission to sell by sub-section (1) *b*, would regard a sale more beneficial than a partition, and exercise the power conferred by the Act of 1868.

In dismissing the appeal for these reasons, I am not to be understood as rejecting the other grounds which have been relied on as leading to the same conclusion. I may have to consider them on some other occasion, but it is unnecessary to do so now.

CHERRY, L.J.:—

This case, is, in my opinion, governed by the decision of the Court of Appeal in *Flood's Estate* (1). There a similar question arose upon the construction of the 45th section of the Landlord and Tenant Act, 1870, which provided that a holding charged with an annuity for the payment of purchase-money under that Act should not, without the consent of the Board of Works, be "alienated, assigned, sub-divided, or sub-let." It was held that the acts of a creditor of a tenant-purchaser in registering a judgment mortgage against the lands, and proceedings in the Landed Estates Court to have them sold, were not in any way a violation of the section. This decision was, in the judgment of FitzGibbon, L.J., expressly based upon the ground that the section only contemplated voluntary assignments by the proprietors of the holdings, and not proceedings by creditors of such proprietors to enforce payment of their debts. I think a similar construction must be put upon the 30th section of the Land Act, 1881. Indeed there are stronger reasons for placing such a restriction on the words of the latter section than there were in the case of the former, for whereas the section of the Act of 1870 prohibited alienation and sub-division in general terms, the 30th section of the Act of 1881 is, in express terms, limited to acts by the proprietors of the holding. I cannot see, therefore, how, consistently with the decision of our own Court

(1) 7 L. R. I. 545.

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in *Flood's Estate* (1), we could hold that the proceedings of a judgment mortgagee to obtain payment of his debt are affected by the conditions of the latter section. It appears to me plain, therefore, that there was jurisdiction in the Court, in the present case, to order a partition, and *a fortiori*, the order for a sale is valid and should be affirmed.

I am fortified in the conclusion at which I have arrived by a decision of the Exchequer Division, which was referred to in the course of the argument, viz.: *Kennelly* v. *Enright* (2), where it was held that a conveyance by the sheriff of a leasehold interest was not an assignment within the meaning of the 10th section of the Landlord and Tenant Act, 1860, upon the ground that it was in substance a transmission by operation of law. This case, though not so clearly in point as *Flood's Estate* (1), involves, I think, the same principle; namely, that the prohibitions against assignment, sub-division, etc., whether contained in leases or in Acts of Parliament, are limited to voluntary acts of the parties, and do not apply to proceedings taken by creditors to enforce payment of the debts due to them; even though such proceedings may involve acts which might at first sight appear to come within the terms of the prohibition.

Solicitor for the defendants (appellants): *M. M. Kenny.*
Solicitor for the plaintiff (respondent): *T. W. Delany.*

W. G.

(1) 7 L. R. I. 545. (2) 8 L. R. I. 33.

WEIR *v.* THE COUNTY COUNCIL OF FERMANAGH AND THE RURAL DISTRICT COUNCIL OF ENNISKILLEN.

Ross, J.
1912.
July 23, 29.

(1912. No. 21.)

Local Government—County Council procedure—Right of ratepayer—Joinder of Attorney-General—"Shall"—Mandatory or directory—Right of County Council to rescind resolutions—Local Government Act, 1898, *Privy Council Order*, 1899.

The plaintiff, a farmer and a ratepayer in the Rural District of Enniskillen, sought an injunction to restrain the County Council of Fermanagh and the Rural District Council of Enniskillen from acting on a resolution carrying into effect a proposal of the Rural District Council to make a new road.

Held, that it was competent for the plaintiff to sue without making the Attorney-General a party.

The proposal was defective, *inter alia* because it omitted to state the number of years within which the money to be borrowed for the work should be repaid.

Held, having regard to the Local Government Act, 1898, and Privy Council Order, made pursuant thereto, that the omission was fatal to the proposal, and that the County Council were therefore not in a position to act upon it.

The County Council, by resolution of January 13th, approved of the proposal; by resolution of February 24th, rescinded the resolution of January 13th; and by resolution of May 15th, rescinded that of February 24th.

Held, that the County Council, in the absence of standing orders to the contrary, had power to rescind the prior rescinding resolution.

TRIAL OF ACTION.

The action was brought by the plaintiff, a farmer and ratepayer in the Rural District of Enniskillen, for an injunction restraining the County Council of Fermanagh and the Rural District Council of Enniskillen from acting on a resolution carrying into effect a proposal of the Rural District Council to make a new road.

The facts and arguments sufficiently appear in the judgment of Ross, J.

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S. L. Brown, K.C., and *W. E. Wylie*, for the plaintiff.

Ronan, K.C., and *Murnaghan*, for the County Council of Fermanagh.

T. J. Smyth, for the Rural District Council of Enniskillen.

P. S. Walsh, K.C., for certain interested ratepayers.

The following cases were cited :—

On the question as to whether it was necessary that the Attorney-General should be added as plaintiff : *Attorney-General* v. *Merthyr Tydvil Union* (1) ; *Boyce* v. *Paddington Borough Council* (2).

On the question whether Article 13 (2) *a* of the Privy Council Order of the 30th January, 1899, was mandatory : *In re Armagh and Caledon Road* (3) ; *In re Ardfert Presentment* (4) ; *The Queen* v. *Ingall* (5).

July 29. Ross, J. :—

The plaintiff is a ratepayer in the Rural District of Enniskillen, in the county of Fermanagh. On the 19th July, 1910, the Enniskillen Rural District Council under the Order of 1899 (Procedure of Councils) decided to adopt a motion moved by one of its members for the construction of a road at an estimated cost of £2400, the expense of such work to be defrayed by the Rural District of Enniskillen. They decided that the expense of executing the work should be defrayed by borrowing. The proposal was forwarded to the County Council. It is alleged that the proposal as formulated was defective. It did not decide the number of years within which the borrowed money should be paid off. Their decision was not embodied as part of the formulated proposal.

On the 13th January, 1911, the proposal No. 24 was passed by the County Council. On the 24th February, 1911, the proposal was rescinded by a majority of the County Council. On the 5th of May a motion was carried by a majority rescinding the resolution of the 24th February, 1911.

(1) [1900] 1 Ch. 516.
(2) [1903] 2 Ch. 556.
(3) 2 C. & Dix. 462.
(4) I. R. 3 C. L. 16.
(5) 2 Q. B. D. 199.

If their motion was all regular and effective, the resolution of 13th January, 1911, would now be in full force, and the work would go on. The plaintiff seeks an injunction to restrain the defendants from acting on the resolution or going on with the work. He further seeks a declaration that the resolution of the 5th May is *ultra vires*, and that the original proposal itself is bad on the face of it and inoperative. The defendants contend, *in limine*, that the plaintiff, without having the Attorney-General joined, is not competent to sue at all. In support of that contention *Boyce* v. *Paddington Borough Council* (1) has been cited.

A Borough Council, holding a disused burial-ground for certain purposes under the Open Spaces Acts of 1877 and 1881, proposed to erect a screen to prevent the plaintiff, an adjoining landowner, from acquiring right of light in connexion with his houses. It was held by the Court of Appeal that the plaintiff could not succeed without having the Attorney-General added. It is plain that the plaintiff had no cause of action at all by virtue of his ownership of the adjoining buildings. If the burial-ground had been in the hands of a private owner, the plaintiff could not have successfully objected to the screen. It was only as a member of the public that he could complain of the Council doing an act that they had no authority to do under the Open Spaces Act. That being so, the Attorney-General was the proper party to sue as representing the public.

But in this case the plaintiff has a distinct cause of action. He will be compelled to pay additional rates for the construction of the road. He has a right to protect himself against an illegal levy, if it is illegal. I am therefore of opinion that he has the right to sue in his own behalf.

The plaintiff's first contention is that the proposal of the District Council is bad by reason of the omission to which I am about to refer.

By the 13th clause of the Privy Council Order of the 30th January, 1899, it is provided that, where the District Council decide to adopt an application, they shall cause a proposal to be

(1) [1903] 2 Ch. 557.

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formulated in accordance with their decision, and, if the proposal is for the execution of a public work, they shall decide whether the expense of executing the work should be defrayed by means of borrowing, and, if it is so decided, the number of years within which the money borrowed should be paid off, and shall cause their decision to be embodied as part of the formulated proposal. They shall also cause the county surveyor to prepare plans and give other particulars.

The District Council did decide that the expense should be defrayed by borrowing, but neglected to decide the number of years within which the money borrowed should be paid off, and to cause their decision to be embodied as part of the formulated proposal.

It is contended for the plaintiff that the clause is mandatory, and that the omission of the essential requirements is fatal to the proposal; in fact, that no legally formulated proposal at all was laid before the County Council.

Under section 60 of the Local Government Act of 1898 the term within which a loan borrowed by the County Council is to be repaid shall be such period, not exceeding sixty years, as the Council, with the consent of the Local Government Board, determine in each case.

It is not contended that the 13th clause of the Order is *ultra vires*. The section and the clause are quite consistent. The District Council are to decide within what time the loan ought to be paid off, but the actual and ultimate decision as to the number of years rests with the County Council and the Local Government Board.

It is contended for the defendants that the word "shall" is not always mandatory, and is not mandatory here. The word "shall," I think, is always mandatory unless the context shows that it was intended to be directory, or unless it appears from the surrounding circumstances that some absurd result would follow if it were used in an imperative sense.

Is there anything to suggest here that what is required in the Order had not to be carried out? The District Council are acquainted with the local state of affairs; they know the rateable capacity of the inhabitants. Why should they not be obliged to decide upon the proper period of repayment? Further, so

important is the matter that they are obliged to embody their decision as part of the formulated proposal, that is to say, the proposal is not a proposal at all if essentials are left out.

It cannot be contended that "shall" when it occurs earlier in the clause is anything but imperative. Where an application is adopted, the District Council must formulate a proposal. What reason can be suggested for a different interpretation when the word occurs three lines lower in the same clause?

The cases cited on the 16th section of the Grand Jury Act of 1836, assuming that they are applicable to this new Act, are not satisfactory. They are mostly circuit decisions, and not consistent with each other.

It is said that these provisions only concern the County and District Councils, and that the ordinary ratepayer is not concerned with them. I think, on the other hand, that the ordinary ratepayer has a right to expect that both Councils will proceed strictly according to law. If they fail to do so, it is his right to compel them. I am, for these reasons, of opinion that the omission is fatal, and that the County Council were never in possession of a legally formulated proposal.

The next matter that has been the subject of contention is whether the order of the 5th of May rescinding the rescission is a valid order.

It is contended that the order of the 24th of February amounted to a rejection, and that the proposal must be put before the District Council again before the County Council has any power to deal with the matter. I do not think there is any substance in the point. The resolution of the 24th of February is not strictly a rejection; it merely rescinds the unqualified adoption. The County Council was still seised of the resolution, and it was in their power to modify or amend it before sending it back. It seems to me that a resolution so long as it is not acted on can be legally rescinded, and that the order of rescission can be rescinded, and so on unless this Penelopean procedure—undoing at night what is done in the morning—is prevented by standing orders. An express power is given to the County Council to make standing orders subject to an order of the Lord Lieutenant in Council.

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Moreover, suggestions for standing orders were issued by the Local Government Board, and one of them does deal with motions for rescission. But no standing order was then in force to prevent unlimited approval and rescission alternatively. Therefore, I hold the resolution of the 5th of May was as effective as that of the 24th February.

In the view I take this is of no importance. I am of opinion that the proposal as formulated was bad on the face of it, and that the County Council were never legally in a position to pass any resolution whatever either of approval or rejection.

Solicitors for the plaintiff: *Clarke & Gordon.*

Solicitors for the County Council of Fermanagh: *Falls & Pringle.*

Solicitor for the Rural District Council of Enniskillen: *James Cooper.*

Solicitor for interested ratepayers: *John E. Wray.*

D. M. S.

In the Matter of O'CONNOR, Deceased; GRACE *v.* WALSH.

M. R.
1912.
April 19, 24.
May 15.

(1912. No. 219.)

Will — Construction — Investment by trustees — Power to invest "as they should think desirable, but not in the British funds" — Purchase of freeholds.

A will contained the following investment clause:—"My trustees being at liberty to sell all my ships, houses, and other property of mine, and invest same as they think most desirable, but not in the British funds, my trustees to be free from all liability in investing any of the money received for the sale of any of my property."

Held, that the above clause authorized the trustees to invest the proceeds of sale in the purchase of freehold lands in England and Ireland.

Originating Summons.

This was a summons taken out by the trustees of the will of Valentine O'Brien O'Connor, late of No. 8 Merrion Square, Dublin, who made his will on April 30th, 1872, and died on September 13th, 1873, for the determination of certain questions arising in the administration of the portion of the property of the testator which had been set apart by his trustees for his daughter the late Ellen A. Hussey Walsh and her children.

The material facts of the case were as follows:—The testator by his will, dated April 30th, 1872, after making a specific devise of certain lands in favour of his wife and only son, disposed of the residue of his property as follows:—

"I leave my houses, ships, money, bills, merchandise, to my trustees, along with every other class of property not mentioned, for the sole use and benefit of my four daughters, share and share alike, for their lives only, and after their death to go to their children in equal shares, my trustees being at liberty to sell all my ships, houses, and other property of mine, and invest same as they think most desirable, but not in the British funds, my trustees to be free from all liability in investing any of the money received for the sale of any of my property; if any of my daughters

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have no children, their portion is to go in equal shares to my grandchildren under this will, I mean only to children of my daughters."

The testator appointed as his trustees Hugh O'Connor, Major William Blount, John Browne, Margaret O'Connor, his daughter, and his wife, Monica O'Connor. He appointed no executors. Probate was granted on October 3rd, 1873, to the said William Blount, Margaret O'Connor, and Monica O'Connor, as executors according to the tenor; and on the 29th December, 1873, a supplemental grant of probate was made to the said John Browne.

The testator left him surviving his wife, Monica O'Connor, one son, William O'Connor, since deceased, and four daughters, namely, Ellen Anne Hussey Walsh, wife of Walter Hussey Walsh, Mary Christina Blount, wife of the said William Blount, Eliza Browne, wife of the said John Browne, and the said Margaret O'Connor, otherwise Grace, wife of Sir Percy Grace, Baronet. Ellen Anne Hussey Walsh married the said Walter Hussey Walsh in June, 1860, and there were five children of the marriage, namely, Valentine John Hussey Walsh, William Hussey Walsh, William P. Hussey Walsh, Maria Margaret Eliza Vincentia Hussey Walsh, and Eileen Mary Hussey Walsh, now Taylor.

The trustees realized the residuary estate of the testator to which his four daughters were entitled for their respective lives, and divided it as it was realized into four equal shares, and set apart and invested the said shares for each of the daughters as and for her share of the residuary estate. Difficulties having arisen in carrying out the trusts of the testator's marriage settlement, and in the administration of his estate, an action was brought on September 15th, 1882, in the Chancery Division of the High Court of Justice in Ireland, by William Valentine Blount, son of the said William and Mary Christina Blount, and others, against William O'Connor and others, defendants, to have the trusts of the settlement carried into execution, and to have the real and personal estate administered, and by a judgment of the Master of the Rolls, dated February 1st, 1884, the said trusts were ordered to be carried out and the real and personal estate administered, and the usual accounts directed: *Blount* v. *O'Connor* (1).

(1) 17 L. R. Ir. 620.

By a further order of March 14th, 1885, an inquiry was directed whether the executors made any division or appropriation of the assets and trust funds as between the legatees, and if so, what were the nature and particulars of the same, and whether the same had been acted on or adopted by any and which of the said legatees, and an account directed to be taken of the payments and investments from time to time made in the cases of such division and appropriation, and the nature and particulars of the assets and trust funds applicable to the share of each legatee in accordance with such division and appropriation.

The trustees, pursuant to the said last-mentioned order, brought in and passed four separate accounts of the shares of the testator's daughters in the trust funds comprised in the settlement and will, showing the division and appropriation of the same among the testator's daughters, which division and appropriation were acted on and adopted by them as set forth in the Chief Clerk's certificate, filed August 17th, 1889.

By a judgment on further consideration, dated November 7th, 1889, it was, amongst other things, ordered that an inquiry be made whether the division and appropriation of the said assets and trust funds between the legatees and *cestui que trusts* was for the benefit of the minors, Annie Blount, Lilian Monica Blount (daughters of the said William Blount and Mary Christina Blount), and Valentine Raymond Grace (son of the said Sir Percy Grace and Margaret Grace) and the said Maria Margaret Eliza Vincentia Hussey Walsh, and Eileen Mary Hussey Walsh; and by a certificate of the Chief Clerk, dated April 29th, 1890, pursuant to the said judgment, it was certified that the said division and appropriation of the assets and trust funds, the subject-matter of the said judgment, made by the trustees of the will as between the legatees and the *cestui que trusts*, and then existing, were for the benefit of the minors, Annie Blount, Lilian Monica Blount, Valentine Raymond Grace, Maria Margaret Eliza Vincentia Hussey Walsh, and Eileen Mary Hussey Walsh, the remaining grandchildren of the testator having then all attained full age), subject to a question whether a certain loan therein mentioned was an authorized investment.

By a further judgment on further consideration, dated July 6th, 1890, it was declared that the said division and appropriation

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mentioned in the last-mentioned certificate were properly made, and were binding on all parties claiming under the settlement and will, and it was thereby also declared that each of the testator's daughters, Eliza Browne, Mary Christina Blount, Margaret Grace, and Ellen Anne Hussey Walsh, was entitled during her life to the income of the several securities set forth in the second and third schedules of the said certificate, filed August 17th, 1889, in the column under the name of such daughters, such security representing residuary estate of the testator, and investments of realized parts of such estate and unrealized trust funds.

It appeared from an affidavit of William Blount and Margaret Grace, filed September 10th, 1885, and by the said certificate of August 17th, 1889, that portion of the assets of the testator, invested and appropriated as and for the share of Ellen Anne Hussey Walsh, and her children, comprised among other investments two properties respectively known as No. 1 Glendower Place, London, and the Mulhussey property situate in the county of Roscommon. No. 1 Glendower Place was conveyed to the trustees of the said will in fee-simple by deed of December 11th, 1875, in consideration of the sum of £5373, being portion of the residuary estate of the testator. The Mulhussey property (which included one-third of an undivided third part of a perpetual rent of £50 late currency) was also held in fee-simple, and conveyed to the trustees by five Landed Estates Court conveyances, of November 23rd, 1877, in consideration of the sum of £9255 3*s.* 9*d.*, other portion of the residuary estate. On July 20th, 1886, a motion was made in the action of *Blount* v. *O'Connor* (1) by the plaintiff, William Valentine Blount, that the judgment in the action of February 1st, 1884, might be added to, by directing that further accounts on the footing of wilful default might be taken in Chambers or in the alternative for liberty to proceed by supplemental action. Several acts of wilful default were alleged, amongst others the investment of part of the testator's personal estate in the purchase of freehold properties in England and Ireland. The properties referred to were No. 1 Glendower Place and the Mulhussey property.

(1) 17 L. R. Ir. 620.

The Master of the Rolls (Sir Andrew Porter) refused the motion, holding that the acts complained of were not wilful default, but acts which (if not authorized by the will) would render the defendants liable to account for the moneys so invested, under the ordinary decree to account (1).

The trustees subsequently invested £3000 in the purchase of a dwellinghouse and premises known as No. 5 Glendower Place, and by deed of December 24th, 1892, the said last-mentioned premises were conveyed to the trustees in fee-simple. The trustees sold No. 1 Glendower Place, on or about July 8th, 1895, for the sum of £5066, and allocated £3,000, part thereof, to the purchase of No. 5 Glendower Place, and treated it with the assent of all parties interested as part of the share of the said Ellen Anne Hussey Walsh and her children; and the same was vested in the trustees of the will.

Maria Margaret Eliza Vincentia Hussey Walsh and Eileen Hussey Walsh, the two children of Ellen Anne Hussey Walsh, who were minors at the date of the Chief Clerk's certificate of April 29th, 1890, had long since attained age. Walter P. Hussey Walsh died in the lifetime of his mother, intestate and unmarried, on September 4, 1906; and his elder brother, Valentine John Hussey Walsh, was his heir-at-law; and his mother, and the said Valentine John Hussey Walsh, William Hussey Walsh, Maria Margaret Vincentia Hussey Walsh, and Eileen Mary Hussey Walsh, were his next-of-kin. Ellen Anne Hussey Walsh died on October 20th, 1911, leaving four of her children, the said Valentine John Hussey Walsh, William Hussey Walsh, Margaret Eliza Vincentia Hussey Walsh, and Eileen Hussey Walsh now Taylor, wife of Ernest Taylor, her surviving. The said Ellen Anne Hussey Walsh made her will, dated March 9th, 1910, whereby she appointed the said Valentine John Hussey Walsh her executor, to whom probate was granted on January 29th, 1912. The present trustees of the will of the testator were Lady Grace, Edward Ferguson Bowen, and Sir Valentine Raymond Grace. By indenture of October 19th, 1907, made between the said Valentine John Hussey Walsh of the first part, Elizabeth Jeanne

(1) 17 L. R. Ir. 620.

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Maria Theresa, commonly called Duchesse de la Motte Houdancourt of the second part, and William Hussey Walsh and Le Comte Marian de Casse Bussac of the third part, on the marriage of the said Valentine John Hussey Walsh with the Duchesse de la Motte Houdancourt, the said Valentine John Hussey Walsh assigned to the said William Hussey Walsh and Marian de Casse Bussac (amongst other things) all his share of the personal estate of the said testator, to which he was entitled in reversion expectant upon the death of the said Ellen Anne Hussey Walsh, upon the trusts therein declared, and by an indenture of January 4th, 1912, the defendant Marcel Dauchez was appointed a trustee of the said settlement along with the said William Hussey Walsh in place of the said Comte Marian de Casse Bussac.

In consequence of the death of the said Walter Patrick Hussey Walsh intestate, as before mentioned, a question arose as to whether the interests of the said Walter Patrick Hussey Walsh in No. 5 Glendower Place, and in the Mulhussey property respectively, or either of them, were real estate, or personal estate, and passed accordingly to his heir-at-law or next-of-kin.

The questions raised by the summons were as follows :—

1. Whether the trustees of the will had power under the will to invest the residuary estate of the testator or any part of it in the purchase of the properties known as No. 1 Glendower Place, London, and the Mulhussey property, in the county of Roscommon.

2. Whether, in case the trustees had not such power, the Court by the various orders and proceedings in *Blount* v. *O'Connor* (1) authorized such investments, so that the same were binding on Mrs. Ellen A. Walsh and her children.

3. Whether the trustees had power to sell No. 1 Glendower Place, and invest a portion of the proceeds thereof in the purchase of No. 5 Glendower Place.

4. Whether such investments or either of them, if authorized by the terms of the will, or by the Court or otherwise, should be treated as real or personal estate, and in particular whether the estate and interest therein which were vested in Walter Patrick

(1) 17 L. R. Ir. 620.

Hussey Walsh at his death passed to his heir-at-law or personal representative.

5. Whether such investments or either of them, if not so authorized, should be realized and distributed as personal estate.

6. Whether the balance of the proceeds of the sale of No. 1 Glendower Place, over and above the portion thereof allocated to the purchase of No. 5 Glendower Place, should be deemed to be real or personal estate.

7. To direct such inquiries as may be necessary.

8. To provide for the costs of the application.

The defendants to the summons were the surviving children of Mrs. Ellen A. Walsh, namely, Valentine John Hussey Walsh, William Hussey Walsh, Maria Margaret Eliza Vincentia Hussey Walsh, Eileen Mary Taylor, and Marcel Dauchez and the said William Hussey Walsh as trustees of the marriage settlement of Valentine John Hussey Walsh.

Oulton, K.C., and *James Sweetman*, for the trustees.

Herbert Wilson, K.C., and *Mooney*, for the next-of-kin of Walter Patrick Hussey Walsh.

S. L. Brown, K.C., and *Hon. Cecil Atkinson*, for the heir-at-law of Walter Patrick Hussey Walsh.

The following authorities were cited:—*Legg* v. *Mordan* (1); *Ware* v. *Polhill* (2); *Ex parte Phillips* (3); *Affleck* v. *James* (4); *Fletcher* v. *Ashburner* (5); *Whitty's Trusts* (6); *Blount* v. *O'Connor* (7); Murray's New English Dictionary, vol. v, p. 457, "Invest."

May 15.

THE MASTER OF THE ROLLS (8):—

The clause in the will is as follows:—[The Master of the Rolls read the clause, *ante*, p. 69.] The principal question for determination is whether the trustees of the will had power to invest the testator's residuary estate in the purchase of freehold or leasehold property as well as on loan or in the purchase of such stocks, shares, or other property as they should think fit. One thing is certain, however unlimited the power of investment may

(1) [1905] 1 Ch. 515.
(2) 11 Ves. 257.
(3) 19 Ves. 118.
(4) 17 Sim. 121.
(5) 1 Wh. & T., 8th ed. [1910] 364.
(6) Ir. Rep. 9 Eq. 41.
(7) 17 L. R. Ir. 620.
(8) The Rt. Hon. R. E. Meredith.

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be, the trustee remains subject to the jurisdiction of the Court. The trustee has no power to act dishonestly, negligently, or in breach of trust to invest on insufficient security, but, subject to the power of the Court to compel a dishonest, grossly negligent, or grossly incompetent trustee to account for money he has so invested, it is in the power of a testator or settlor to place in the hands of his trustee money to be invested in the fullest sense of the word, and I need no further or better authority for the proposition that a power to invest *simpliciter* enables a trustee to invest in the purchase of real estate, provided he does so honestly and as a reasonable man, than the Trustee Act, 1893, section 6 of which is a sufficient justification for the conclusion at which I have arrived on that point. The section runs as follows:—"A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase or on mortgage of any land, notwithstanding the same is charged with a rent, under the powers of the Public Main Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge." The word "invest" is there used as equivalent to purchase. A reference to Murray's New English Dictionary shows that the term "invest" is used in the sense of to purchase, as well as placing out money on loan or other security.

In my opinion, the dictionaries, lay and legal, support the view of Mr. Brown that the term "invest," unless cut down or minimized by the testator or settlor, embraces purchase of land with moneys, as well as placing money on loan. But Mr. Wilson's argument was a very cogent one, that the liberty given by the testator to the trustees to invest the proceeds of the sale of his property as they thought most desirable, except in British funds, did not authorize them to purchase land, and that a power to invest was not regarded as a power to purchase, and that all the provisions of the Trustee Act assumed or begged the question that there was on the face of the instrument a power to purchase land.

In my opinion there is the clearest and most express power in this will to invest in land, the only investment that is barred by the testator being that which is always regarded as most secure,

the British funds. He empowers his trustees to sell all his property, and to invest the proceeds "as they think most desirable, but not in the British funds." There are no restrictions here except one, investment in British funds. If I may misuse the maxim *expressio unius est exclusio alterius*, it comes to this that the negation of the power to invest in British funds is an expression of a power and liberty to invest in any kind of investment known to the law, but the testator was well aware that the Court of Chancery would hold the trustees responsible for moneys that came to their hands, for the benefit of minors and others, if they did not act in the way in which a reasonable man acting with reasonable prudence and not grossly negligent would act, and that when trustees came to make up their accounts with their *cestui que trusts*, it could not be said that they had authority to purchase, *e.g.*, a number of houses in a street in such a state of disrepair that the local authority would order them to be pulled down.

My construction of the will is supported overwhelmingly by the decision of Sir Andrew Porter in this very case: indeed, Mr. Wilson directed my attention to the report of *Blount* v. *O'Connor* (1). That case is a clear decision that the investments, one of which is quarrelled with here, were investments by which the parties were bound.

No doubt there is a passage in the judgment of Sir Andrew Porter, at p. 631 of the report, as follows:—"These advances were made at the express request of the several persons entitled to the respective shares, and are, so far as I can see, good payments to them on account of their shares." This statement is not accurate, because though the advances were made at the request of the several persons entitled, they were made at the request of tenants for life, not of those that came after. But still I think that the Master of the Rolls came to the conclusion that the investments in land were within the powers of investment conferred by the will.

Then there is the order of July 8th, 1890. It answers in the affirmative the questions referred by the Master of the Rolls to the Chief Clerk. It declares that the division and appropriation of the assets and trust funds made by the executors

(1) 17 L. R. Ir. 620.

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and trustees of the will which the Chief Clerk found to be for the benefit of the minors were properly made and binding on all persons claiming under the settlement and will. Mr. Brown goes further than is necessary in asking me to hold that the property was rightly converted from that time. I only rely on it as a sanction by the Master of the Rolls of investments as good investments within the power, and not capable of being objected to, or of being set aside, even by persons acting on behalf of minors. I do not think that the Master of the Rolls had the question of conversion before him at all, but I hold that the purchase of land and house property was a lawful investment, and that no one in connexion with the suit objected to the investments on the ground of negligence, extravagance of price, or for other similar reasons, and that the net result is, as regards the Mulhussey property and No. 1 Glendower Place, that the investments being authorized investments, the *cestui que trusts*, not having dissented or elected to take the property one way or another, must be held to have taken the property as they found it, as real estate, subject to this, that the general power to invest for the benefit of a number of persons necessarily implied a power to transpose and re-invest, and therefore that Mr. Brown's contention is well founded, that the £2000, portion of the £5000, proceeds of the sale of No. 1 Glendower Place, is divisible amongst the next-of-kin, and that the heir-at-law takes the rest, which was invested in the real estate, namely, No. 5 Glendower Place.

I only refer to two cases; the first is *Legg* v. *Mordan* (1), in which the word "invest" received the widest meaning, and though Mr. Wilson pointed out that that was a decision on the words of a particular will, and that reliance was placed in the judgment of Vaughan Williams, L.J., on the word "rents" in the clause dealing with the distribution of the income, yet I think that his judgment may be divided into two, and that in the first part of it he held that the power to invest upon freehold and leasehold ground rents authorized the purchase of leasehold ground rents. The judgment of Stirling, L.J., is free from doubt. He says:—"It appears to me that if the authority to invest on

(1) [1905] 1 Ch. 515.

Government securities would justify a purchase of Consols or other Government security, the authority to invest on freehold or leasehold ground rents must equally justify a purchase of freehold or leasehold ground rent." Sir Gorell Barnes agreed. The second case, *In Re Gent & Eason's Contract* (1), in the same volume, shows that the word "investment" may have a wider meaning than it is supposed to possess, and it is also an authority that trustees may transpose and vary securities.

I shall not refer to other cases which have not been discussed, but I have not been able to find any case which would compel me to give a restricted meaning to the words of this will.

The Court made the following order :—

As to question No. 1 in said summons this Court doth declare that the trustees of the will of the testator in the title hereof mentioned had power under the said will to invest the residuary estate of the said testator, or any part thereof, in the purchase of the properties known as No. 1 Glendower Place, London, and the Mulhussey property in the county of Roscommon. The Court doth not deem it necessary to answer question No. 2, and as to question No. 3 the Court doth declare that the said trustees had power to sell the said property, No. 1 Glendower Place, and invest portion of the proceeds thereof in the purchase of No. 5 Glendower Place; and, in answer to question No. 4, this Court doth declare that the estate and interest of Walter Patrick Hussey Walsh in such investments, so far as same consisted of real estate, at the death of the said Walter Patrick Hussey Walsh passed to his heir-at-law, and, so far as same consisted of personal estate, to his personal representative, and the Court doth not deem it necessary to answer question No. 5; and as to question No. 6 this Court doth declare that the balance of the proceeds of the sale of No. 1 Glendower Place, over and above the portion thereof allocated to the purchase of No. 5 Glendower Place, should be deemed to be personal estate; and this Court doth declare the plaintiff and the said defendants entitled to their respective costs of the said application and this order thereon when taxed and ascertained, said costs to be paid

(1) [1905] 1 Ch. 386.

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rateably out of the portion coming to the said heir-at-law as real estate, and the portion coming to the said personal representative as personal estate.

Solicitors for the trustees: *E. & G. Stapleton.*

Solicitors for the defendants: *O'Keeffe & Lynch*; *Fottrell & Sons.*

W. L.

Wylie, J. 1912. Nov. 5, 12.

IN THE MATTER OF THE ESTATE OF MARY M. SWEETMAN.

Land Purchase Acts—Irish Land Act, 1909 (9 *Edw.* 7, *c.* 42), *s.* 15, *sub-s.* 1 *—Limitations on advances to tenant-purchasers—Prior advance redeemed —Computation of, on application for subsequent advance.*

A tenant applying for an advance under the Land Purchase Acts, in pursuance of an agreement entered into after the passing of the Irish Land Act, 1909, can only obtain such a sum as, when added to any previous advances obtained by him, will be within the limits prescribed by section 15, sub-s. 1, of the said Act, and it is immaterial whether the prior advances were made before or after the passing of the said Act. In computing the amount of advances for the purpose of section 15, sub-s. 1, the original amount of a prior advance must be reckoned, whether entirely redeemed or not.

QUESTION OF LAW submitted by the Estates Commissioners for the opinion of the Judicial Commissioner under section 23 (1) of the Irish Land Act, 1903.

From the memorandum of the Estates Commissioners the following facts appeared:—Patrick Hanlon, who was tenant of five holdings on above estate, had entered into agreements, dated the 1st day of November, 1910 (subsequent to the passing of the Irish Land Act, 1909), for the purchase of the said holdings at prices amounting in the aggregate to the sum of £4144, and had applied for advances amounting in all to the sum of £4144, for the purchase of said holdings. The said Patrick Hanlon had not, since the passing of the said Act of 1909, obtained any advance under the Land Purchase Acts, but prior thereto he had obtained advances amounting to the sum of £5000, under the Land

Purchase Acts, for the purchase of other holdings. The annuities payable by the said Patrick Hanlon in respect of said advances of £5000 had been by him redeemed, and there was at present no subsisting liability in respect of said advances.

The following question was submitted:—Is a tenant, who has, after the passing of the Irish Land Act, 1909, entered into an agreement for the purchase of his holding entitled (subject to the terms of section 15 of the said Act) to obtain an advance under the Land Purchase Acts for the purchase of his said holding, notwithstanding that, prior to the passing of the said Act, he had obtained advances to the extent of £5000 under the Land Purchase Acts, for the purchase of other holdings, the annuities in respect of which advances he has since redeemed?

James O'Connor, K.C., Carrigan, K.C. (with them *D. J. O'Brien*), for Patrick Hanlon:—

The only provisions now in force limiting the amount of advances in pursuance of agreements for the purchase of holdings entered into after the passing of the Act of 1909 are those contained in section 15 (1) of that Act. The first statutory limitation on the amount of advances was that prescribed by section 34 (3) of the Act of 1881. There the limitation was in respect of any one purchase, and a tenant with several holdings could get an advance up to the limit in respect of each. That provision was repealed by section 18 (2) of the Act of 1887; and, by section 17 of that Act, a new limitation was imposed on the aggregate amount of advances to any one purchaser of land. This section was impliedly repealed by section 2 of the Act of 1888, which reduced the limit of the amount of advances to any one purchaser of land, subject as mentioned in the section. This section, as modified by section 1 (4) of the Act of 1903, regulated the amount of advances that could be made to any one tenant-purchaser up to the time of the passing of the Act of 1909. These provisions are now repealed by section 15 (3) of the Act of 1909, save as regards advances made in pursuance of purchase agreements entered into before the passing of this Act. The language used in sub-section 1 is, "no advance exceeding the sum of

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£3000 shall be sanctioned . . . to any tenant, in pursuance of an agreement for the purchase of a holding" . . . In other words, the Legislature has reverted to the policy of the Act of 1881. The limitation imposed by the sub-section merely affects the amount that can be advanced in respect of any one holding. It follows that a tenant coming in under the Act of 1909, who has several holdings, is entitled to an advance up to the limit mentioned in the sub-section in respect of each, quite irrespective of any previous advance made to him under the Land Purchase Acts. The main object of imposing a limitation on the amount that can be advanced is to ensure that the tenant-purchaser will be in a position to offer sufficient security to the State. To this extent only is the fact that the tenant-purchaser has paid off his previous advances a material consideration. Apart from that, the fact that the previous advance has been paid off does not affect the right of the tenant-purchaser to get the advance now applied for.

Arthur Meredith, K.C., for the vendor, supported the arguments put forward by Patrick Hanlon :—

Section 15 of the Act of 1909 draws a clear distinction between advances for the purchase of holdings under "this Act" and under the prior Land Purchase Acts. A similar distinction appears in section 17 (2) of the same Act, limiting the amount of advances for the purchase of parcels. "Purchaser" in the latter sub-section means so long as he is a tenant-purchaser. It was never intended to penalize a tenant who has obtained an advance up to the limit, and prohibit him from getting a further advance, once the prior advance has been paid off. Section 32 (4) of the Act of 1909 supports this view.

The Solicitor-General (*T. F. Molony, K.C.*) (with him *Gerald Horan*), for the Treasury :—

If the contention put forward on behalf of the tenant-purchaser and vendor were correct it would follow that section 15 of the Act of 1909 must be construed as an enlarging section. It was clearly intended by the section further to limit the amount of advances that could be made to tenants coming in under the

Act of 1909. Section 32 (1) (*a*) of that Act shows that this is so. Here the tenant-purchaser has already obtained the full amount of advances to which he is entitled under the Land Purchase Acts. In *Williams' Estate* (1) Meredith, J., held that in estimating the amount that can be advanced a previous advance should be estimated at the amount previously advanced. The fact that the previous advance has been repaid does not affect the question. An advance does not cease to be an advance because it is repaid. The tenant-purchaser is for ever personally disqualified from receiving a further advance. There is no provision in the Land Purchase Acts removing this personal disqualification, when the advance has been repaid. Section 32 (4) of the Act of 1909 shows that when the Legislature intended to remove any statutory restrictions affecting a holding in respect of which the whole advance had been repaid, or the proprietor thereof, it considered it necessary to do so in express language.

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In this case the Estates Commissioners have submitted to me what at first sight appears to be a very simple, but is in reality a very difficult, question. It is as follows:—Is a tenant who has, after the passing of the Irish Land Act, 1909, entered into an agreement for the purchase of his holding entitled (subject to the terms of section 15 of the said Act) to obtain an advance under the Land Purchase Acts for the purchase of his said holding, notwithstanding that, prior to the passing of the said Act, he had obtained advances to the extent of £5000 under the Land Purchase Acts, for the purchase of other holdings, the annuities in respect of which advances he has since redeemed?

The question is in form an abstract one, but it arises out of the concrete case of Patrick Hanlon, the facts of which are stated by the Estates Commissioners thus :—

[His Lordship referred to the facts as above set out, and continued.] Now there is no doubt that the statutory provisions applicable to this particular case are those contained in section 15 of the Act of 1909, which are in these terms :—"No advance

(1) 21st Oct. 1904 (unreported).

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exceeding the sum of £3000 shall be sanctioned under the Land Purchase Acts to any tenant, in pursuance of an agreement for the purchase of a holding entered into after the passing of this Act, unless" he is a resident tenant; and the Land Commission consider that an advance of a larger amount, not exceeding £5000, may properly be sanctioned. The question is, what does this section mean, having regard to the other provisions of this and prior Acts limiting advances?

Counsel for the vendor and the tenant-purchaser both contend that all the provisions of the prior Acts limiting advances have been repealed by section 15 (3) save as to agreements entered into prior to the passing of the Act of 1909, and that, the agreement in the present case having been entered into after the passing of that Act, the only limiting provisions now in force affecting such an agreement are those in section 15 (1). This being so, they further contend that section 15 (1), according to its natural and true construction, merely limits the amount that may be advanced in respect of one particular holding, and that, if a tenant had a number of holdings sufficiently large, he would be entitled, notwithstanding section 15 (1), to an advance not exceeding £3000 in respect of each of the holdings, irrespective of their aggregate amount, and also irrespective of any previous advance, whether under the Act of 1909 or the prior Acts. It is obvious that, according to this view of the meaning of section 15 (1), it is immaterial whether any former advance has been redeemed or not.

Now, I think it very probable that most people on reading this section, if entirely ignorant of the previous legislation affecting advances, would adopt the view so put forward on behalf of the tenant-purchaser: but the result of that view is so startling to anyone familiar with the Land Purchase Acts and the prior statutory provisions limiting advances, that it becomes necessary to look more closely and critically at the language of the section, to see if it is not capable of another meaning, when read, as we are bound to read it, with other provisions of the Act of 1909 and prior Acts.

But before dealing with the language of section 15 (1) of the Act of 1909, let us see how the law stood as to the limit

of advances prior to, and at the date of, the passing of the Act of 1909.

The first statutory limitation upon the amount of an advance is contained in section 34 (3) of the Act of 1881, and I think the words of that section are important. "Any advance made by the Land Commission to a purchaser of a holding or of any parcel of land, in respect of any one purchase by him under this Act . . . . shall not exceed £3000," unless the Commission on special grounds with the consent of the Treasury think it expedient to make an advance not exceeding £5000. Now, there can be no question as to the meaning of that sub-section. Its terms are clear and specific, and only limit the amount of an advance to a purchaser of a holding or of any parcel of land in respect of any *one purchase*. So that, if a tenant had several holdings under the same or different landlords, he could, notwithstanding that section, have got an advance up to the limit in respect of each.

This sub-section, however, was repealed by section 18 (2) of the Act of 1887, and by section 17 of that Act a new limitation was enacted in these terms:—"No advances shall be made by the Land Commission to any one purchaser of land under the Land Law (Ireland) Acts, exceeding the sum of £5000 in all." The meaning of that section is also free from doubt and clearly limits the advance or aggregate advances to any one purchaser to £5000.

This section again was expressly repealed by the Act of 1896, but was previously impliedly repealed by section 2 of the Act of 1888, which enacted—"No advance shall be sanctioned by the Land Commission to any one purchaser of land under the Purchase of Land (Ireland) Act, 1885, or the Acts amending the same, exceeding the sum of £3000, unless in the opinion of the Land Commission the advance of such larger amount (not exceeding £5000) is expedient" for a certain purpose. That section clearly reduces the limit of advance previously allowed to any one purchaser from £5000 to £3000, unless on one special ground.

Now this was the section that regulated the amount of advances allowed to any one tenant-purchaser up to and at the date of the

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passing of the Act of 1909, except that, by section 1 (4) of the Act of 1903, an advance not exceeding the sum of £7000 might be sanctioned to one purchaser on a special ground mentioned in the sub-section.

Now, when we come to consider the proper construction of section 15 (1) of the Act of 1909, there are two or three matters which, I think, it is important to bear in mind. In the first place, the expression used in section 2 of the Act of 1888 was "*to any one purchaser of land*," not to any one tenant or tenant-purchaser, and the expression so used was strictly accurate up to the passing of the Act of 1903, because, prior to that Act, though a landlord could only sell to his tenant, the Land Commission could sell parcels of land to others than tenants under section 7 of the Act of 1885; and, by that section, the provisions limiting advances applied to them in the same way as to purchasing tenants. This section, however, was repealed by the Act of 1903, and by section 2 of that Act both landlords and the Land Commission were empowered to sell parcels of an estate under the Acts to certain classes of persons mentioned in the section. But sub-section 2 enacted that "advances under this section shall not, together with the amount (if any) of any previous advance under the Land Purchase Acts then unrepaid by the purchaser, exceed £1000"; provided that this sum might be exceeded on special grounds up to the amount limited in other cases. Therefore, at the time the Act of 1909 was passed, the provisions limiting the advances to tenants purchasing their holdings differed from those applicable to purchasers of parcels under section 2 of the Act of 1903. These provisions as to both, however, have been repealed by the Act of 1909, those applicable to tenant-purchasers by section 15, and the others by section 17, and new and independent provisions are substituted for these two classes of purchasers respectively by those sections. Therefore, as you would expect, when the Legislature proceeds to enact, by section 15, the limitations upon advances to tenants as distinguished from other purchasers, it does not use the word "purchaser" or "any purchaser" or "any one purchaser," but enacts that "no advance exceeding the sum of £3000 shall be sanctioned under the Land Purchase Acts to any tenant."

Now, if the section had stopped there, would it not be clear that no one tenant could by any future advance get more than, with other advances made to him under the Land Purchase Acts, would amount to £3000. But if it had stopped there, its effect would have been contrary to the intention of the Legislature, as shown by the rest of the section; because sub-section 3, which repeals section 2 of the Act of 1888 and sub-section 4 of section 1 of the Act of 1903, saves from this repeal the multitude of pending agreements entered into prior to the passing of the Act of 1909, in respect of which advances had yet to be made. Hence it was necessary, in order to make the whole section consistent, that sub-section 1 should read thus: "No advance exceeding the sum of £3000 shall be sanctioned under the Land Purchase Acts to any tenant, in pursuance of an agreement for the purchase of a holding entered into after the passing of this Act."

It seems to me that the meaning and object of this sub-section was to apply the new limitations to any tenant coming in either for a first advance or for an additional advance in pursuance of an agreement entered into after the passing of the Act, leaving to tenants coming in under agreements entered into prior to the passing of the Act the larger rights conferred by section 2 of the Act of 1888 and section 1 (4) of the Act of 1903. But if the construction of sub-section 1 contended for by counsel for the tenant in this case were correct, this would be an enlarging provision and would confer on future tenant-purchasers a right to advances far in excess of what could be obtained by such purchasers under pending agreements, whose larger rights are expressly saved. I think the terms of sub-section 1 show clearly, when compared with the repealed sections, that it was intended further to *limit* the amount of advances obtainable by future tenant-purchasers, and not to increase it.

I think that further light is thrown upon the intention of the Legislature by the provisions of section 32 of the Act of 1909. Sub-section 1 (*a*) of that section provides that the proprietor of a holding, for the purchase of which an advance shall have been made after the passing of the Act, shall not, without the consent of the Land Commission, acquire by purchase any other holding

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for the purchase of which an advance has been made under the Land Purchase Acts, if the amount of that advance then outstanding, when added to the amount of the advance or advances made in respect of the holding or holdings then held by the proprietor, would exceed the sum of £7000. Is it conceivable that the Legislature would thus specially prohibit a tenant-purchaser, who had obtained advances in respect of his own holdings, from acquiring by purchase another holding in case the advance outstanding upon it would increase his own advances beyond £7000, if, as contended for by counsel for the tenant, they intended by section 15 (1) to enable a tenant of a number of holdings to obtain advances far exceeding that figure.

It seems to me, therefore, that section 15 (1) of the Act of 1909 is capable of the construction I have indicated, and that no other construction would be consistent with the provisions of the Land Purchase Acts when read together, as we are bound to read them; and I hold, therefore, that a tenant applying for an advance in pursuance of an agreement entered into after the passing of the Act of 1909 can only obtain such a sum as, when added to any previous advances obtained by him, will be within the limits prescribed by section 15 (1) of said Act, and that it is immaterial whether those prior advances were made before or after the passing of the Act of 1909.

But there still, I think, remains a question to be considered separately, whether any prior advance that has been entirely redeemed is to be brought into account in ascertaining the total amount of advances obtained by any tenant when a fresh advance is applied for?

In *In re Estate of Thomas Spunner* (1) the Estates Commissioners submitted to my predecessor, Meredith, J., the question, whether the words "any one purchaser" in section 2 of the Act of 1888 included an assignee of a person to whom an advance had already been made under the Land Purchase Acts, and while deciding that question in the negative, he says in his judgment (2):—"Now, reading the Act of 1888, whether by itself or together with the other statutes in the code, I do not think that

(1) 38 I. L. T. R. 166. (2) Ib., at p. 167.

there is any doubt that the words 'any one purchaser of land' refer to the individual who makes an application to the Land Commission for an advance. I am quite clear that if a tenant was to purchase his holding by means of an advance under the Act of 1888 he could not, having sold his holding to someone else, claim to be free from the provisions of the Act of 1888, and start fresh as a tenant who owed no money to the State, and so be enabled to get advances up to £3000, or, if the Land Commission should think fit, to £5000. I am perfectly clear that the statute meant to prohibit anyone . . . from borrowing money from the State to purchase his holding, then selling, and coming in again as the tenant of another holding, and getting an advance of another £3000, and repeating the operation, it may be three or four times." Now, with that view I entirely agree; but do the prohibition and the reason for it apply where the tenant, applying for a fresh advance, has entirely redeemed his previous advance?

The Solicitor-General, on behalf of the Treasury, contended that once a tenant-purchaser has obtained advances up to the limit he is for ever afterwards personally disqualified from obtaining any fresh advance, whether the prior advances have been redeemed or not. There can be no question, I think, that this was the law prior to the Act of 1909. It is clear from section 30 of the Act of 1896 that, in computing the amount of advances to a tenant-purchaser, it was the original amount of the advances that were reckoned, and not the amount for the time being outstanding, and I can find nothing in any Act prior to 1909 to suggest that the entire redemption of an advance would strike it out of the reckoning, though section 9 (4) of the Act of 1891 shows that the disability imposed upon a *holding* in respect of a fresh advance, while it is subject to a purchase annuity, is removed by the entire redemption of the annuity.

But there are provisions in section 32 of the Act of 1909 which have puzzled me a good deal. I cannot, of course, say why the Legislature imposed these limits on advances to tenant purchasers, the result of which is to prevent many tenants from purchasing all their holdings, or whether it was the same reason as that which underlies section 32 (1) (*a*), already referred to, whereby the proprietor of a holding or holdings for the purchase of which

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advances have been made after the passing of the Act is prohibited from acquiring by purchase, without the consent of the Land Commission, any other holding for the purchase of which an advance has been made, if the amount of that advance then outstanding, when added to the amount of the advance or advances made in respect of the holding or holdings then held by him, would exceed the sum of £7000. Now, whatever may have been the reason for that prohibition, sub-section 4 provides that it shall cease to have effect as regards any holding, or the proprietor thereof, when the whole of the advance made for the purchase of that holding has been repaid. In other words, though the whole of an advance made to a tenant-purchaser is to be reckoned in ascertaining the limit of £7000 within this section, so long as any part of the advance is unrepaid, yet, when the entire advance is redeemed, it is no longer to be brought into account.

As I made use of section 32 (1) (*a*) in aid of the construction which I have put upon section 15 (1), I have tried to see whether it is not possible to read into section 15 (1) the effect of section 32 (4) but the latter is expressly limited to the conditions imposed by section 54 of the Act of 1903 and section 32 of the Act of 1909. I, therefore, feel bound to hold that, in computing the amount of advances for the purpose of section 15 (1), the original amount of a prior advance must be reckoned, whether entirely redeemed or not.

I, therefore, answer the question put to me in the negative.

I merely wish to add that since I wrote this judgment I was referred to the last paragraph of the judgment of Cherry, L.J., in *In re Lyons' Estate* (1), where he appears to think that section 15 (1) must be construed in the same way as section 2 of the Act of 1888.

Solicitor for Patrick Hanlon: *Paul A. Brown.*
Solicitor for the vendor: *John Kilkelly.*
Solicitor for the Treasury: *W. G. Towers.*

J. E. W.

(1) [1911] 1 I. R. 452.

In the MATTER of the ESTATE of THE LIFE ASSOCIATION OF SCOTLAND.

Ross, J.
1912.
Dec. 10.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *sect.* 48 (4)—*Insolvent estate—Absolute order for sale—Bonus—Mortgagee in possession during pendency of petition—Statutes of Limitation.*

Mortgagees having carriage of proceedings in the Land Judge's Court cannot enter into the possession of the lands for sale in the matter, and on the dismissal of the petition set up such possession as giving them a title under the Statutes of Limitation against the mortgagor. During the pendency of the proceedings they hold as trustees for all persons interested in the lands.

Two absolute orders for the sale of B's insolvent estate were, in 1881, made by the Land Judge, on the petitions of the mortgagees and of the owner. The mortgagees' petition was abandoned, but not dismissed till 1912. In 1882, a Court receiver was appointed over the lands. In 1894 the Court receiver was discharged and a receiver appointed over the lands by the mortgagees having carriage of the sale. In 1898 the mortgagees appointed their receiver to be their agent and attorney, and went into possession of the lands as mortgagees in possession. In 1907 the owner's petition was dismissed, and the mortgagees proceeded to sell the lands to the tenants under the Irish Land Act, 1903, and sought to make title to the lands as absolute owners.

Held, that time would not run in favour of the mortgagees until the date of the dismissal of the petition for sale, and that, the estate for sale being the insolvent estate of B, no bonus was payable.

Question arising on allocation.

By a mortgage dated 13th July, 1880, made between B. M. Bloomfield of the first part, J. C. Bloomfield of the second part, and the vendors of the third part, the lands sold in this matter were with others granted to the vendors, their successors and assigns, to secure a sum of £24,500 with interest thereon at the rate of 5½ per cent., and by an indenture of even date therewith, made between the same parties of the first and second parts, and A. B. O'Conor of the third part, the

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latter was appointed receiver to receive the rents and profits of the lands and pay the interest on the mortgage to the vendors.

The interest on the said mortgage having fallen into arrear, the vendors, on 26th April, 1881, presented a petition for sale of the lands in the Land Judge's Court, in a matter entitled "Estate of Benjamin M. Bloomfield, owner, *Ex parte*, The Life Association of Scotland, petitioners"; and an absolute order for sale was made in the said matter on 24th August, 1881.

On 17th November, 1881, Benjamin M. Bloomfield also presented a petition for the sale of the said hereditaments, and an absolute order for sale was made therein, and it was arranged that no further steps should be taken on the first-mentioned petition, and that the carriage of the second matter should be given to the vendors; and, accordingly, the proceedings in the first matter were abandoned, and the said petition was dismissed on 18th August, 1912.

By an order made in the second matter, dated 27th November, 1882, it was ordered that a receiver should be appointed over the lands ordered to be sold in that matter; and by a subsequent order Charles Murray Alexander was appointed receiver over the same.

By an order dated 11th June, 1894, made in the second matter, the said receiver was discharged pursuant to an arrangement made between the parties, and by an indenture dated 17th July, 1894, and made between the vendors of the one part, and Anthony F. Maude of the other part, the vendors, in exercise of the powers conferred on them under the statute in that behalf, appointed the said Anthony F. Maude to be a receiver to receive the rents and profits of the said lands, and to pay the net rents and profits to the vendors until the arrear of interest due to them, and all future interest to become due, should be fully paid. In 1898 a difficulty was experienced in managing the estate and making arrangements with the tenants for statutory terms, and the vendors, acting on the advice of their solicitors, went into possession of the lands as mortgagees in possession, and, under a power of attorney dated 24th August, 1898, appointed the said A. F. Maude as their agent and attorney.

Since the last-mentioned date the vendors dealt with the lands for sale in the said matter as their own, and gave no acknowledgment or account to any person in respect thereof.

Some portions of the lands comprised in the second petition were sold, and with a view to a sale being made under section 6 of the Irish Land Act, 1903, by order dated 24th October, 1907, the petition was dismissed, and the balance of the lands were sold in the present matter under section 6 of the Irish Land Act, 1903.

The vendors now applied that the percentage payable out of the Land Purchase Aid Fund, calculated at the rate of 12 per cent. on the purchase-money, and amounting to £1712 17*s.* 7*d.*, should be paid to the vendors.

S. L. Brown, K.C., and *Macrory*, for the vendors:—

The vendors went into possession of the estate in 1898 as mortgagees in possession, and became absolute owners by the Statute of Limitations.

The Solicitor-General (*Molony, K.C.*), and *Horan*, for the Treasury:—

This is an insolvent estate, and no bonus is payable. The first petition for the sale of the Bloomfield estate was not dismissed till August, 1912. The second petition was dismissed in 1907. Therefore an absolute order for the sale of the estate by the Land Judge was in force at the passing of the Act of 1903, and the bonus section (1) does not apply.

During the pendency of the petitions the Life Association, who were trustees for all parties, could not set up an adverse title in themselves: *In re Hickson's Estate* (2).

(1) Section 48 (4) of the Irish Land Act, 1903, is as follows:—"This section shall not apply to any estate sold by the Land Judge, where the estate is so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price, or to any estate so circumstanced in respect of which an absolute order for sale by the Land Judge was in force at the date of the passing of this Act, or to any estate sold by a mortgagee in possession."

(2) [1911] 1 I. R. 301.

Ross, J. 1912.

In re Life Association of Scotland's Estate.

S. L. Brown, K.C., in reply:—

There is ample evidence in the affidavits of the intention of the mortgagees to go into possession in 1898, as mortgagees in possession, with all the responsibilities of mortgagees in possession. The orders for sale in force at the passing of the Act of 1903 were orders for sale of the Bloomfield estate, not the estate of the Life Association of Scotland.

Ross, J.:—

In my opinion, the position taken up by the Life Association is wholly untenable. They claim to be absolute owners of the estate under the Statutes of Limitation, having entered into possession in 1898, and having given no acknowledgment since that date to anyone.

The whole question is, in what capacity did they take possession in 1898? The dominating fact is, they were in possession under the absolute order in trust for all parties interested in the estate.

The order giving them carriage made them trustees for carrying out what was directed by the absolute order of the Court. It is impossible to hold that, because they got an order dismissing the petition, they are not to be considered as having ever been trustees.

They cannot alter the nature of their possession by any document altering the status of Mr. Maude without the consent of the Court.

I hold that no time could run in their favour until the date of the dismissal of the petition. The case made by the vendors completely fails, and no bonus is payable.

Solicitors for the vendors: *A. O'Conor & Son.*
Solicitor for the Treasury: *W. G. Towers.*

D. M. S.

CUMMINGS *v.* STEWART (No. 2).

(1911. No. 798.)

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Nov. 13.

Patent—Action for royalties—Construction of licence—Lapse of patent by non-payment of fees—Implied covenant by patentee to pay fees—Dependency of covenant to pay royalties—Impossibility of performance of substantial part of contract.

A patentee of improvements for making re-inforced concrete called the Cummings system, patented in the United Kingdom, France, and Austria, respectively, granted the exclusive right to work the patents during the full terms for which they were granted; the licensee expressly admitted the validity of the patents and agreed to pay a royalty of 2½ per cent. on the total amount included in every contract for work executed on the Cummings system, and a minimum amount of 5000 dollars each year during the continuance of the agreement. The patentee agreed to protect the patents against infringement, and to defend any proceedings brought against the licensee for the infringement of other patents. There was no provision as to payment of the renewal fees. The patentee did not pay the renewal fees on the French and Austrian patents, and they lapsed owing to the non-payment. The licensee worked the invention in England only, and without success. The licensee paid the minimum royalty at first, but declined to pay at the end of the third year, and an action was brought by the patentee to recover the amount then due. The defendant resisted the claim on the ground (1) of want of novelty of the invention; (2) that under the agreement the plaintiff was bound to pay the renewal fees, that, owing to his failure to pay the fees in France and Austria, the patents in those countries lapsed, and that the lapse of the patents relieved the defendant from liability to pay the royalty. The defendant counterclaimed for a declaration that the agreement was not binding, and for a return of £52 12*s.* 9*d.*, paid under a mistake. The plaintiff contended (1) that the agreement imposed no obligation on him to pay the fees; and (2) that even if it did, the breach of the agreement by him in that respect was no defence to the action, but only gave a right to damages to be recovered on a counterclaim; and (3) that as the United Kingdom patent remained valid, there was at most a partial failure of consideration, which did not release the defendant from his agreement to pay the royalty.

Held (1) That the defence of want of novelty was not open to the defendant; (2) that there was an implied covenant by the plaintiff to pay the renewal fees; (3) that the covenant to pay the royalties was not an independent

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covenant, but dependent on the performance by the plaintiff of the implied covenant to pay the fees; (4) that, owing to the lapse of the foreign patents, a substantial part of the subject-matter of the agreement was destroyed, and the agreement in a substantial part became impossible of performance and ceased to be binding; and (5) that as the royalty was a fixed sum, the consideration was indivisible, and the failure of part was equivalent to failure of the entire.

Mills v. *Carson*, 10 R. P. C. 9, distinguished: *Lines* v. *Usher*, 14 R. P. C. 206, followed.

TRIAL OF ACTION.

This action was brought by the plaintiff, who was an American citizen, residing in America, against the defendant, who was a contractor carrying on business in Belfast, to recover royalties payable under an agreement dated April 3rd, 1907. The terms of the agreement, and the other facts of the case, are sufficiently stated in the head-note and the judgment.

S. L. Brown, K.C., D. M. Wilson, K.C. (with them *Best, K.C.*, and *Newett*), for the plaintiff :—

The defendant says that the agreement is not binding on him for two reasons—(1) That the invention was not new or original; (2) that the plaintiff allowed the French and Austrian patents to lapse through non-payment of the renewal fees. As to (1), it is not open in this action by reason of the agreement and the estoppel which arises from the defendant's position as licensee. In clause 9 the validity of the patents is expressly admitted. A licensee is like a tenant, and cannot dispute the title of the licensor: *Ashworth* v. *Law* (1); *Clarke* v. *Adie* (2); *Mills* v. *Carson* (3).

As to (2), the plaintiff was not bound to pay the renewal fees; there is nothing in the agreement about paying them, and there is no ground for implying an obligation to pay them. This question was discussed in *Mills* v. *Carson* (3). It was an action on a covenant in an agreement under seal to recover royalties. The main defence was that the obligation of the licensee to pay the royalties ceased because the patentee had failed to fulfil the

(1) 7 R. P. C. 231.
(2) 2 A. C. 423.
(3) 10 R. P. C. 9.

implied obligation to pay the renewal fees. The Court of Appeal held that a covenant to pay the renewal fees could not be implied, and that, even if it could, the covenant was an independent covenant. There was there a covenant for quiet enjoyment, but the Court held that even if the non-payment of the fees was a breach of it, it was an independent covenant, and that the defendant's remedy, if any, was by a counterclaim. Lord Esher there cites with approval the rule laid down in *Hamlyn & Co.* v. *Wood & Co.*(1), that a stipulation is not to be implied in a written contract, unless an implication necessarily arises that the parties must have intended that the suggested stipulation should exist.

That case shows that where, as here, an agreement mentions certain events in which royalties are to cease, one cannot imply any further event in which they are to cease: *Lines* v. *Usher* (2) will be relied on on behalf of the defendant, but that case turned on the construction of the agreement, clause 6 of which provided that the patentees were to protect and defend the patent from infringement, and in default of their so doing the royalty should cease to be payable. The plaintiff's action was to recover back royalties paid in ignorance of the fact that the patent had lapsed by non-payment of the fees, and the Court of Appeal, the members of which, Lord Esher, M.R., and Lopes, L.J., were parties to the judgment in *Mills* v. *Carson* (3), held that the agreement to protect the patent obliged the defendants to keep it in full force, and that there was a breach of that agreement, the consequence of which was that the royalties should cease to be payable. So here clause 13 contains an agreement to defend the patent, but no such consequential provision in case of breach as in *Lines* v. *Usher* (2).

[It was also urged that the cause of the lapse of the foreign patents was non-user. The plaintiff and other witnesses were examined on behalf of the plaintiff and defendant, including several foreign lawyers of eminence on the French and Austrian law as to the lapse of patents by reason of non-payment of fees and non-user, the purport of whose evidence, so far as it is material, is given in the judgment.]

(1) [1891] 2 Ch. 488.
(2) 14 R. P. C. 206.
(3) 10 R. P. C. 9.

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Ronan, K.C., and *Herbert Wilson, K.C.* (with them *James Andrews*), for the defendant :—

There was an implied covenant by the plaintiff to pay the renewal fees; the consideration for the defendant's promise to pay the royalty was the performance of this implied covenant. There was a partial failure of consideration by reason of non-payment of the fees for the foreign patents, and the action is not maintainable, as part of the consideration has failed: *Pordage* v. *Cole* (1), where the rules as to the construction of covenants, dependent and independent, are discussed, and *Chanter* v. *Leese* (2) and *Ellen* v. *Topp* (3) are cited. In *Chanter* v. *Leese* (2) an action was brought to recover a half-yearly payment under an agreement for a licence to use six patents; one of these patents was alleged to have been void to the knowledge of the plaintiff at the time that the agreement was made. It was held that the enjoyment of all the six patents was the consideration for every part of the defendant's promise, and that the annuity payable under the agreement could not be apportioned. *Ellen* v. *Topp* (3) was a case of apprenticeship; the master undertook to teach the apprentice the business of an auctioneer, appraiser, and corn factor; the master gave up the business of corn factor, whereupon the apprentice absented himself from the master's service. It was held, in an action on the indenture by the master against the father for the desertion of the apprentice, that the relinquishment by the master of his trade of corn factor was an answer to the action, the ground of the decision being that the performance of the covenant to teach was a condition precedent to the obligation to serve. The position of the defendant is analogous to that of a tenant sued for rent, who has been evicted from part of the demised premises. Eviction from part of the premises is the eviction from the whole: Foa on Landlord and Tenant, 4th ed., p. 168; *Upton* v. *Townsend* (4).

[The Master of the Rolls referred to *Irish Society* v. *Tyrrell* (5).] That case turned on section 44 of Deasy's Act (23 & 24 Vict. c. 154).

In *Hayne* v. *Maltby* (6), the plaintiff, pretending to derive a

(1) Notes to 1 Wm. Saunders (1871 ed.), pp. 554–5.
(2) 4 M. & W. 295.
(3) 6 Ex. 423.
(4) 17 C. B. 64.
(5) 16 Ir. C. L. R. 249.
(6) 3 T. R. 438.

right under a patent, assigned to the defendant part of that right on certain terms, and brought an action against the defendant for breach of covenant to use the patent right in a particular way. A plea that the patent was void for non-enrolment was held good on demurrer, the defendant not being estopped from showing that the patent was void. In *The London Gaslight Co.* v. *Chelsea Vestry* (1) the plaintiffs contracted by deed to light the parish lamps for a given period from sunset to sunrise with gas of good quality and sufficient in quantity, and the parish contracted to pay the company for that service at the rate of £4 10*s.* per annum for each lamp. The action was brought for the amount due for a year under the contract. The defendants pleaded (1) that the plaintiffs did not light the lanterns during the said period to the satisfaction of the defendants or their surveyor, and (2) that the plaintiffs did not supply the lanterns with the gas of the quality stipulated for in the deed. It was held on demurrer that these pleas were no answer to the action. Erle, C.J., said that it was not one of unity of contract on one side and of promise on the other. There was a severable contract with a severable consideration and a severable promise. It would be monstrous to hold that the failure to keep one lamp alight should operate an entire destruction of the plaintiff's claim, which it would do if they were to hold that the performance by the plaintiffs of each and every of the stipulations in the deed on their part was a condition precedent to their right to call upon the defendants for the stipulated payments. In the present case, however, the consideration is not severable; a fixed sum is payable. The agreement is made "in consideration of the faithful keeping, observance, and performance by each party of the several and respective covenants on his part therein contained." In *Mills* v. *Carson* (2) the agreement was "in consideration of the covenants thereinafter contained." In Leake on Contracts, 6th ed. (1911), p. 466, the construction of contracts as to conditions is discussed, and it is pointed out that the obligation of the one provision may be expressly or impliedly conditional upon the due performance of the other. In Pollock on Contracts, 8th ed. (1911), p. 272,

(1) 8 C. B. (N. S.) 215. (2) 10 R. P. C. 9.

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the author points out that when a contract consists in mutual promises which on one or both sides are not to be completely performed at one time, and a party who has not performed the whole of his own obligation complains of a failure on the other side, questions arise which may be of great difficulty. He says that in the earlier decisions the Courts inclined to treat the several terms of a contract, unless expressed to be dependent on the other party's performance as separate and independent promises, but that at this day the tendency is the other way. The Court looks to the purpose and effect of the contract as a whole as a guide to the probable intention of the parties, and the presumption, if any there be, is that breach or default in any material term of the contract between men of business amounts to default in the whole. That applies here. In *London Guarantee Co.* v. *Fearnlie* (1), Lord Watson says, at p. 919 :—"When the parties to a contract of insurance choose in express terms to declare that a certain condition of the policy shall be a condition precedent, that ought, in my opinion, to receive effect, unless it shall appear either to be so capricious and unreasonable that a Court of Law ought not to enforce it, or be *suâ naturâ* incapable of being made a condition precedent." In *Baskin* v. *Bidwell* (2), a case of landlord and tenant, the cases as to when the performance of a covenant is a condition precedent are collected and discussed. See also *Starkey* v. *Burton* (3).

Even if the words "in consideration of the performance of the covenants" were not in the agreement, still the continued existence of the patents was a condition precedent to the right of the plaintiff to sue for the royalty. The first and second clauses must be read together. Clause 11 points to performance of the covenants being the consideration. No particular form of words is necessary to create a covenant: Norton on Deeds, p. 484. From the proviso at the end of clause 13 there must be an implied term that nothing is to be paid after the patent has been declared void. The agreement here is different from that in *Mills* v. *Carson* (4); the contract there was to pay on certain

(1) 5 A. C. 911.
(2) 18 Ch. D. 238.
(3) [1909] 1 Ch. 289.
(4) 10 R. P. C. 9.

specific dates. There was a covenant for quiet enjoyment and for further assurance, and a proviso for cesser in certain events. The Court there thought that there was an implied covenant by the patentee to pay the fees, though they did not decide the point, but only assumed it to be so. An act of the promiser, which disables him from performance, may be equivalent to a breach in giving an immediate cause of action: Leake on Contracts, 6th ed. (1911), p. 636, citing *Forde* v. *Foley* (1); *Short* v. *Stone* (2); *Frost* v. *Knight* (3); *Lovelock* v. *Franklyn* (4). The covenant to defend the patent against infringement implies a covenant to pay the fees: *Lines* v. *Usher* (5) is directly in point. It was an action to recover back royalties paid in ignorance of the fact that the patent had been allowed to lapse by non-payment of the fees. It was held there on the construction of the agreement that the patentee was bound to prevent the patent from lapsing, and that in default of payment of the fees it was agreed that the consequence was that the royalties should cease to be payable. *Mills* v. *Carson* (6) was not an authority contra. Each case turns on the construction of the particular agreement. Decisions on the interpretation of instruments if the words are only similar or somewhat similar are not binding: *Aspden* v. *Seddon* (7), *per* Jessel, M.R.; *Pedlow* v. *Rood Block Gold Mines of India, Limited* (8), *per* Warrington, J., cited in Beal's Rules of Interpretation, pp. 30, 31. [They also referred to *Roberts* v. *Bury Commissioners* (9); *Mackay* v. *Dick* (10); *Scurfield* v. *Garland* (11); *Higgins* v. *Coates* (12); *Rhodes* v. *Forword* (13); *The Moorcock* (14); *Hanley* v. *Wood* (15).]

D. M. Wilson, K.C., in reply:—

There is no implied obligation on either party to pay the renewal fees nor on the licensee to work the patent: Terrell on

(1) 6 B. & C. 325.
(2) 8 Q. B. 358.
(3) L. R. 7 Ex. 111.
(4) 8 Q. B. 371.
(5) 13 R.P.C. 685; 14 R.P.C. 206.
(6) 10 R. P. C. 9.
(7) L. R. 10 Ch. App. 397, note.
(8) [1905] 2 Ch. 437.
(9) L. R. 5 C. P. 326.
(10) 6 A. C. 263.
(11) 6 East, 241.
(12) 5 Q. B. 432.
(13) 1 A.C. 256.
(14) 14 P. D. 64.
(15) [1891] 2 Q. B. 488.

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Patents, p. 196. There was a clear liability here on the defendant to pay at least 5000 dollars. Even if there was an implied covenant by the plaintiff to keep up the patent, the consideration is divisible, and the covenants are independent, and the defendant's remedy is to bring an action for damages for breach of the covenant: *Stavers* v. *Curling* (1), notes to *Cutter* v. *Powell* (2). In *The Africa Gold Recovery Company* v. *The Sheba Gold Mining Company* (3), a licence to use a patented process for the extraction of gold was granted for a term of four years, ending in 1900, on payment of a royalty of 5 per cent. on the value of all bullion extracted by means of the process. The patent was during the term cancelled as the result of litigation in South Africa. The defendants refused to pay any further royalties. It was held by Mathew, J., that the plaintiffs were entitled to be paid the royalty notwithstanding the cancellation of the patent. It was argued that, if the patent was revoked, the analogy of landlord and tenant arose, and the cancellation of a patent was equivalent to eviction, and was a good defence to the action. Mathew, J., however, said that there was no analogy between cancellation and eviction, and that it was the case of an ordinary one of a licensee under a patent who is bound to adhere to the terms of his agreement as long as he uses the potential process.

Nov. 13.

THE MASTER OF THE ROLLS:—

This is an action brought for the recovery of royalties alleged to be payable by the defendant, in respect of a licence granted to him by the plaintiff to exploit and use a certain system of reinforced concrete construction, for which the plaintiff had taken out patents in the United Kingdom, France, and Austria.

The licence is embodied in articles of agreement, dated 3rd April, 1907, and made between the plaintiff and the defendant. It recites that the plaintiff is the inventor and owner of improvements in metal for reinforced concrete construction, known as the "Cummings system," and protected by European letters patent, of which the particulars are given.

(1) 3 Bing. N. C. 355.
(2) 2 Smith, L. C. (11th ed.), p. 14.
(3) 14 R. P. C. 660.

These particulars are set out as follows:—

"Concrete Columns and the like, United Kingdom and Ireland, No. 14,295, dated July 11th, 1905; fourteen years; others pending."

"France, No. 356,131, dated July 13th, 1905; fifteen years; others pending."

"Austria, No. 26,570, dated July 15th, 1905; fifteen years; others pending."

"Also for concrete girders and floor slab reinforcement, several applications pending, but not yet issued."

The agreement then recites that the licensee is desirous of using the improvements, &c., covered by the said letters patent and applications aforesaid, in and for the construction of reinforced concrete structures, with the intent of introducing, exploiting, and using the Cummings system within the United Kingdom and France and Austria, and other European countries.

These recitals are followed by an agreement, expressed to be made in consideration of the nominal payment of one dollar, and the faithful keeping, observance, and performance by each party of the several and respective covenants and agreements on his part therein contained, whereby the parties agreed and covenanted as follows:—

1. The plaintiff (described as licensor), as beneficial owner, granted to the defendant (described as the licensee) the right, licence, and privilege of using, exercising, and putting in practice the improvements, &c., covered by the said several letters patent, and any patent or patents relating to reinforced concrete construction thereafter secured by him in and for the construction and building of reinforced concrete structures of all kinds in accordance with the Cummings system, within and throughout the United Kingdom, France, Austria, and other European countries, the said right, licence, and privilege to continue for the full term of the several letters patent or those thereafter granted, unless it should be previously revoked as thereinafter provided for, and that the licence should be sole and exclusive.

2. The licensee agreed to pay the licensor, for the privilege and license to use the Cummings system, a royalty of 2½ per cent.

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on the total or gross amount included in every contract for work actually executed on the Cummings system, entered into by the licensee or his sub-licensees, the royalty not to be less in any year than 5000 dollars, during the continuance of the agreement, except that during the first three years the amount should not aggregate less than 5000 dollars, of which 1000 dollars must be paid within the first year, 1,500 within the second year, and 2,500 within the third year. The third and fourth provisions need not be referred to.

By the 5th clause, the licensee agreed not to sub-let, assign, or transfer the rights and privileges conferred upon him by the licence, without first procuring the written consent of the licensor, any assignment to be considered a cancellation of all the rights of the licensee; provided that the licensee might, without any such consent, transfer the licence to a limited company formed to carry on his business, or the business connected with and arising out of the patents and the licence.

By the 6th clause the licensee was given power to grant sub-licences within the territory (that is, the United Kingdom, France, and Austria), to contractors or other suitable persons, the licensee undertaking to pay the licensor 2½ per cent. on all contracts entered into by the sub-licensees for work done under the Cummings system. The 7th and 8th clauses are unimportant.

By the 9th clause, the licensee expressly admitted the validity of all the letters patent, and agreed that all the reinforced concrete work which he should construct within the territory under the Cummings system should be deemed and taken as constructed under this licence and be subject to the payment of the royalty therein provided, and the covenants therein contained. The 10th clause need not be noticed.

By the 11th clause, the licensor was given the right to revoke the licence upon the violation by the licensee of any of the conditions of the licence to be performed by the licensee, or on the happening of any of certain events therein mentioned. The 12th clause is unimportant.

By the 13th clause it was agreed that in case the letters patent should be infringed within the territory, that is, the United Kingdom, France, and Austria, and such infringing act or acts

should be of a nature calculated then, or in the near future, to practically interfere with the business of the licensee conducted within the territory under the said letters patent or any of them, or that of any of the sub-licensees, the licensor should, if so requested by the licensee, and if advised by competent counsel that the patents were infringed, at his, the licensor's, own cost, take all necessary proceedings to defend the patent or patents so infringed, and to stop the infringement thereof; and it was provided that in case the letters patent should, for any reason, be declared invalid by a Court of competent jurisdiction, the licensee should have no claim for the return of any moneys paid to the licensor under the licence, nor should he be discharged from liability for such royalties as might have accrued at the time the patents were declared invalid.

By the 14th and last clause it is provided that if, during the continuance of the licence, the licensee or any of his sub-licensees should be sued for infringement of any other patent or patents, and the alleged infringing act or acts should consist of the use by him or them, within the territory mentioned, of any process or apparatus or improvement therein patented by any letters patent included within the licence, then, and in any such case, the licensor should, at his own expense, assume and properly conduct the defence of any such suit or suits, and should hold and save harmless the licensee and his sub-licensees from any judgment for costs, damages, or profits which might be recovered or ordered to be paid by the licensee or any of his sub-licensees in any such suit or suits, provided that in the event of any such suit or suits against the licensee or any of his sub-licensees he or they should, when requested by the said licensor, forthwith discontinue the use of the alleged infringing process or apparatus, until said suit or suits should be ended, or said licensor should consent to a resumption of such use; and refusal or failure of said licensee to comply with such request should release said licensor from all obligation or liability under this clause of the agreement; provided further that unless said licensor should request the discontinuance of all operations under the license, or same be discontinued owing to an order of a Court of competent jurisdiction, the institution of any such suit or suits against the licensee should not release the

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licensee from his obligation to continue the construction and building of reinforced concrete constructions under the Cummings system, and to pay the royalty agreed on.

This is the agreement on which the action is brought, and which I have stated at some length, in view of the long discussion which took place at the hearing on its true construction.

The circumstances which have led up to the present action are as follows:—

The defendant did not make a success of the Cummings system of reinforced concrete construction which he was entitled to work under his licence. It was a failure in the United Kingdom, where he tried to work it. He did not work it at all in France or Austria. Whether this was owing to any defect in the system, or because some better system was available, or because the public were not sufficiently appreciative to recognize its merits, or because the defendant had not sufficient capacity to exploit it, it is unnecessary to inquire. Suffice it to say that the defendant failed to make it profitable. He became liable, under the agreement, to a royalty of $2\frac{1}{2}$ per cent. on the gross amount of all contract work, with a proviso that the royalty to be paid by him should not be less in any year than 5000 dollars, save during the first three years, during which he was to be liable to 5000 dollars in the aggregate—1000 dollars to be payable in respect of the first year, 1500 in respect of the second year, and 2500 dollars in respect of the third year.

On the work done by the defendant during the first year, which expired on the 3rd April, 1908, the royalty payable by him, at the rate of $2\frac{1}{2}$ per cent., worked out to the sum of only £31 1s. 6d.; but he was liable under the agreement to the extent of 1000 dollars as a minimum, for that year.

An application was made by the plaintiff to the defendant in August, 1908, for payment of 1000 dollars. This demand was met by the defendant's cheque for £31 1s. 6d., calculated as above mentioned, and which the plaintiff declined to accept. A correspondence then ensued, in the course of which the defendant alleged that he was induced to enter into the agreement by representations made by the plaintiff, and which the plaintiff knew were not correct; and that the defendant had a good claim against the plaintiff for damages.

The defendant, while this correspondence was proceeding, had evidently made up his mind that he had entered into a very ruinous contract, and sought some means of escape from it. He accordingly had recourse to the following method for relieving himself from continuing liability. The agreement prohibited an alienation of the licence, without the consent of the plaintiff; but with the proviso that the defendant might transfer the licence to a limited company formed for the purpose of carrying on the business connected with the patents. Accordingly, the defendant promoted a limited company, under the name of "Concrete Constructions, Limited," and by deed, dated 26th July, 1909, transferred all his rights under the agreement to this company. Notice of the assignment was given by the defendant to the plaintiff on the 11th August, 1909; but its validity was contested by the plaintiff; and as the defendant does not rely upon it as affording any defence in the present action, it need not be further referred to.

On the 4th January, 1910, the plaintiff instituted an action against the defendant, claiming the minimum royalties then due under the agreement, and the defendant filed a defence, pleading that he was induced to enter into the agreement by the fraudulent representations of the plaintiff, and counterclaiming to have the agreement set aside. That action came on for trial on the 15th and 16th February, 1911, when the defendant unreservedly withdrew all charges of fraud, and submitted to a decree for royalties at the minimum rate prescribed by the agreement, up to the 4th January, 1910 (1); and on the 13th March, 1911, the defendant paid to the plaintiff the sum of £902 7*s.* 3*d.*, which discharged his full liability to the 4th January, 1910.

On the 3rd April, 1910—the date of the termination of the third year after the agreement—the balance of a year's minimum royalty, after giving credit for what was paid up to the 4th January, 1910, became due; and on the 3rd April, 1911, another full year's minimum royalty, amounting to 5000 dollars, became due. These further sums were not paid by the defendant, whereupon a second action was brought in the King's Bench

(1) See *Cummings* v. *Stewart*, [1911] 1 Ir. R. 236.

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Division, for the recovery of the amount due to date. The writ was specially endorsed, and a motion for final judgment was instituted by the plaintiff. This motion was met by two separate defences not previously raised, and as they are the defences relied upon in the present action, I will, for the present, reserve mention of them. The King's Bench Division, without pronouncing any opinion on the validity of the defences, decided that the action was not one for summary judgment—a decision which was upheld by the Court of Appeal. That action was then discontinued; and the present action was instituted on the 31st October, 1911.

There is one other matter to be mentioned as part of the history of the case. The renewal fees payable to the proper authorities in the three countries of the United Kingdom, France, and Austria, for the purpose of maintaining the patents, had been paid by the plaintiff up to the date of the agreement; and since the agreement they have been paid by the plaintiff up to the present time in England, but in France and Austria the fees were paid by the plaintiff only to July, 1909. As from that date the plaintiff, without informing the defendant of his intention, dropped paying the renewal fees, and they have since not been paid by any person.

The relief now claimed by the plaintiff is:—

(1) A declaration that the said agreement of the 3rd April, 1907, is a valid and subsisting agreement, and binding on the defendant, and that the defendant, by virtue of the said agreement, is under a continuing liability to pay the plaintiff the royalties referred to in the agreement during the full terms of the several letters patent therein mentioned.

(2) Payment from the 4th January, 1910, to the date of the judgment of the minimum royalties due under clause 2 of the agreement; and other ancillary relief.

In answer to this claim, the defendant raises two defences, which are set out in the 4th and 5th paragraphs of the statement of defence, and which are as follows:—

"4. The defendant says that it was a condition of the said agreement that the said Cummings system of reinforced concrete construction was then, and would continue to be, protected by the

plaintiff by valid letters patent for the full terms thereof, as follows—United Kingdom and Ireland, No. 14,295, dated July 11th, 1905, fourteen years; others pending. France, No. 356,131, dated July 13th, 1905, fifteen years; others pending. Austria, No. 26,570, dated July 15th, 1905, fifteen years; others pending. Yet each of the said letters patent was and is invalid, for the reasons following:—(*a*) The said alleged invention was not new or original. It was disclosed, and was publicly known and used in Great Britain prior to the date of the said letters patent. All the essentials covered by the said patents were anticipated by the plaintiff's United States prior patent, 764,883 of July 12th, 1904, the specification of which was open for public inspection in the Patent Office, London, prior to his application for the letters patent mentioned in paragraph 1 of the statement of claim, and was therefore public property; (*b*) As to the French and Austrian patents, the defendant says that the plaintiff, in the breach of the agreement, allowed the letters patent to lapse in both countries, through non-payment of the renewal fees due and payable by the plaintiff in respect of the same, prior to the date upon which any of the payments claimed in this action accrued due.

"The defendant will submit that, by reason of the matters hereinbefore referred to, the said agreement is no longer binding upon him.

"(5) The facts mentioned in paragraph 4 (*a*) were not known to the defendant until long after the decree of the 16th February, 1911, in paragraph 9 of the statement of claim referred to, and the payments made thereunder. They were fraudulently suppressed by the plaintiff, who thereby induced the defendants to execute the said licence agreement.

"The defendant counterclaims for a declaration that the said licence agreement is of no binding effect; and counterclaims for the sum of £52 12*s.* 9*d.*, mentioned in the 3rd paragraph of the defence as having been paid to the plaintiff under a mistake."

The paragraphs contain two separate and independent defences, and they must be dealt with separately. The first is to the effect that each of the letters patent granted in the United Kingdom, France, and Austria, was and is invalid, because the

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patented invention was not new or original. Now, this is a statement affecting all the patents, but the particulars given, which, as alleged, show want of novelty or originality, are confined to England. It is alleged that the invention was publicly known in Great Britain prior to the date of the letters patent, and that all the essentials covered by the plaintiff's patent were anticipated by the plaintiff's United States prior patent, the specification of which was open for public inspection in the Patent Office, London, and was, therefore, public property. This, apparently only affects the validity of the English patent; and as the evidence given at the trial on this part of the case was confined to England, and as it was not argued that the French or Austrian letters patent were void for want of novelty or originality, I must treat the allegation of invalidity, although general, as confined to the English patent.

I am bound, however, to hold that the defence of invalidity is not open to the defendant. Apart from express contract, the relationship of licensor and licensee raises an estoppel on the latter from disputing the validity of the patent; and want of novelty affects the validity of a patent from the beginning. It is alleged, however, that the facts which deprived the plaintiff's invention of the essential feature of novelty were fraudulently suppressed by the plaintiff. If this defence were proved, the estoppel on the defendant would be removed; but I can find absolutely no evidence of fraud. So far as the evidence goes, I hold that the plaintiff honestly believed that he held a valid and valuable patent. If it were necessary to do so, I would also be prepared to find, on the evidence, that, in fact, the patent was valid.

But the defence on which the defendant mainly relied was that which arose out of the non-payment by the plaintiff of the fees payable in respect of the Austrian and French patents. This defence raises most important and difficult questions of law.

The case of the defendant is :—

(1) That under the contract between him and the plaintiff there was an obligation on the latter to pay the annual fees which it was necessary to pay in order to keep the patents alive during the term of the license.

(2) That in consequence of the failure of the plaintiff to pay

the fees payable in Austria and France, the patents lapsed in both those countries; and

(3) That the lapse of those patents relieved the defendant from all further liability to pay the royalties provided for by the contract.

The plaintiff, on the other hand, denied that the lapse of the patents was caused by the non-payment of the renewal fees, and contended, even if this were so—

(1) That the contract threw no obligation on him to pay the renewal fees;

(2) That, if there was any such obligation on him, and he was guilty of a breach thereof, this did not afford a defence to the action, but only gave a right to damages, to be recovered on a counterclaim.

(3) That, as the English patent remained an existing and valid patent, there was, at most, only a partial failure of consideration, which did not release the defendant from his contract to pay royalties.

An adjudication on these several questions involves a very careful consideration of the contract between the plaintiff and the defendant; but it is first necessary to ascertain, as a matter of fact, depending on the law regulating patents in France and Austria, whether the patents in those countries lapsed in consequence of the non-payment of the renewal fees payable in respect of them.

In the case of both the French and Austrian patents the annual renewal fees were paid by the plaintiff up to the 15th July, 1909. The payment of the renewal fees for both patents, for the next year, should have been made on that date; but a period of grace is allowed, and the fees would have been accepted, in both countries, if paid at any time up to the 15th October, 1909. The fees were, in fact, never paid, with the result, as alleged, that the patents lapsed.

The plaintiff, however, says that it was not in consequence of the non-payment of fees, but in consequence of the non-working of the French and Austrian patents by the defendant, who had the exclusive right to work them, that the French and Austrian patents lapsed. It is necessary, therefore, to determine the precise effect on an Austrian and French patent of non-payment of renewal fees and non-working. On this point, distinguished lawyers from Vienna and Paris gave expert

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evidence on both sides. There was no material conflict between them. In the case of Austria they were agreed that non-payment of the renewal fees absolutely and automatically destroyed the patent, while non-working only made the patent voidable if any member of the community applied to the proper tribunal to have it avoided ; but, until this was done, the patent remained a valid patent. The difference between the Austrian lawyers lay in the opinion expressed on the question whether, if application were made to have the plaintiff's patent avoided on the ground of non-working, the circumstances were such that the application should necessarily succeed. The conclusion which I arrived at, having heard the evidence, is that the application would likely succeed; but still the fact remains that the patent, until forfeited by non-payment, continued to be a valid patent, and might, but for the non-payment, have continued to be a valid patent during the whole term of the license. The forfeiture was the direct legal result of the non-payment, and the non-payment only.

The case of the French patent is similar, save that under French law non-payment did not, *de facto*, forfeit the patent, but made it forfeitable on application as of course.

It will be seen that, in the view which I take of the whole case, the slight difference in the patent laws of the two countries is not material.

I will next examine the agreement, with a view to seeing whether it contemplated the continued payment of the fees, and, if so, by whom. Now, it seems to me to be clear to demonstration that both parties intended that the fees, the payment of which was necessary for the continued existence of the patents, should be paid during the whole term of the licence. To establish this it is only necessary to refer to one or two of the principal clauses of the agreement. Take the clause entitling the licensor at any time during the continuance of the licence to revoke it on the happening of any of certain events therein enumerated (clause 11). This clause would be unmeaning unless, at the date of the revocation, the patents should be existing patents, the full enjoyment of which the licensor should be entitled to resume. It is obvious that that involved the payment of the fees up to the date of the revocation, for otherwise there would be no patents in existence, and there would be nothing on which the revocation could operate.

Take another clause, that which obliges the licensor, in case the patents were infringed, to take legal proceedings to defend them (clause 13). Here again, the continued existence of the patents, involving the payment of fees, is assumed.

There are other clauses in the agreement which seem to me to establish beyond doubt that the payment of the fees, by some one, was contemplated by the contracting parties. But, indeed, it is unnecessary to refer to any special clauses or words in the agreement to enforce this view, because the very grant of a licence to work under a patent for a fixed term involves the maintenance of the patent during the term. If not, the subject-matter of the licence would disappear before the expiration of the term.

I am, therefore, satisfied that the basis of the contract was that the fees should be paid. Let me now see, by whom? The contract is silent on the point; is there anything in it which necessarily implies that the fees should be paid by one party rather than by the other? Let us see what were the respective positions of the parties immediately before the contract was made. The plaintiff was the owner of the patents, and had been owner for nearly two years. He had been paying the fees during that time. He was still to remain the owner, because a licence does not effect a transfer of the property licensed. The payment of fees was an incident of ownership. One would expect, then, that if there was to be a shifting of this liability, the contract would provide for it. It does nothing of the kind. On the contrary, it purports to measure the full liability so far as payment is concerned, of the licensee. He is made to pay for the licence a royalty of $2\frac{1}{2}$ per cent. on the gross amount of every contract for work done under the licence, with a minimum fixed in order to provide for the event of the percentage not reaching a certain figure. From the beginning to the end of the agreement there is nothing to suggest that the licensee should be under any further pecuniary liability to the licensor. On the other hand, there is much expressed which most plainly implies payments by the licensor in connexion with the patents which protected the Cummings system of reinforced concrete. The licence covered, not merely the patents in existence at the date of the contract, but also any patent or patents thereinafter to be secured by the licensor within and throughout the United Kingdom, and France and Austria, and other European

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countries. Now, who should pay the fees in connexion with the grants of the new patents?—Surely, the person who was to obtain them, viz., the licensor; so that the licensor was intended to be under at least some liability after the grant of the licence.

Further, the covenant by the licensor to protect the licensee from infringement seems to imply a maintenance by him of the patents as a performance of a necessary condition to enable him to comply with his covenant.

I must, therefore, hold, as a matter of construction of the contract, that the plaintiff was bound to pay the fees necessary for the maintenance of the patents, and that this was the basis on which the parties contracted.

This is, of course, entirely a question of construction; and little light can be thrown on it by decided cases; but I may mention here that in the case of *Mills* v. *Carson* (1), which was so strongly relied on by the plaintiff, two of the learned Judges who decided that the non-payment of fees, resulting in a lapse of the patent, did not relieve the licensee from liability for a royalty, were inclined to the opinion that the patentee was under an obligation to pay the fees. But a decision almost directly in point is not wanting. In *Lines* v. *Usher* (2) a licensee of a patent, who had actually paid royalties, was held entitled to recover them from the patentee, because the latter had allowed the patent to lapse before the accrual of the royalties. That was a decision of the Court of Appeal on a contract which contained a clause binding the patentee to protect and defend the patent against infringement. Lord Esher, M.R., and Lopes and Chitty, L.JJ., were of opinion that such a clause—and this was the basis of their judgment—necessarily involved an obligation on the patentee to maintain the patent by the payment of renewal fees. In the agreement between the plaintiff and the defendant in this action there is a clause which is practically similar.

But the plaintiff says further, that even though the payment of the patent fees was his obligation, and, even though his neglect involved the loss of all the patents (which it did not, the British patent being still in existence), it would not have relieved the defendant from liability; and that the defendant's only remedy, if any, would lie in a counterclaim, or cross-action for damages.

(1) 10 R. P. C. 9. (2) 14 R. P. C. 206.

The plaintiff's argument is that the covenant by the defendant to pay royalties is an independent covenant carrying with it an obligation, irrespective of the performance of any obligation on the plaintiff—in other words, that the mutual obligation is the consideration for the contract between the plaintiff and defendant; and that non-performance by one did not release the other, and, at most, only gave a claim for damages. It was not disputed by the defendant that, in the case of an independent covenant, an action for breach thereof may be successfully brought, even though there is non-performance by the plaintiff of his part of the obligation. But the defendant maintained that his covenant to pay the royalties was not an independent covenant, and that it was impliedly conditional upon the due performance of the substantial part of the plaintiff's obligations under the contract. The question thus raised is, again, one of construction of the contract (*Pordage* v. *Cole* (1)), and once more I have to call attention to its contents, so as to get at the meaning of the parties.

The second clause contains the covenant to pay royalties, on which the defendant is sued. The plaintiff says this is an independent covenant, the consideration for which was the mere giving of a licence, quite irrespective of, and not depending upon, the effectiveness and maintenance of the licence during the term for which it was granted. But, surely, this is at variance with the language of the contract. Go back to clause 1, which contains the grant of the licence. The grant is of the "right, licence, and privilege of using, exercising, and putting in practice the improvements, devices, and appliances, &c., said right, licence, and privilege to *continue* for the full term of the several letters patent, &c." This was the consideration for the defendant's covenant, and to my mind it conveys very much more than the mere giving of a licence, irrespective of its operation. It involves the continuing existence of a right and privilege springing out of the giving of a licence—the continuing existence being the consideration for the continuing obligation to pay, *de anno in annum*. In other words, the consideration for the defendant's covenant to pay royalties was not merely the obligation of the plaintiff to secure the privilege of working the patents, but the performance of the obligation. This

(1) 1 Williams' Saunders, 550, n. 2.

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construction is enforced by the words of the contract, which is expressed to be made "in consideration of the faithful *keeping*, *observance*, and *performance* by each party of the several and respective covenants and agreements on his part herein contained." These words govern the whole contract, and if there was (as I hold there was) an implied covenant to keep up the patents, so as to make the licence effective, the performance of that covenant was the real consideration for the defendant's covenant to pay, and was a condition precedent to liability upon it. The defendant's covenant is, therefore, a dependent covenant; and the argument of the plaintiff breaks down.

The law upon this subject is so clearly laid down in "Pollock on Contracts" that I will venture to read, from page 246 to 248 of the sixth edition, some passages which, in my opinion, govern the present case:—

"When a contract consists in mutual promises, which on one or both sides are not to be completely performed at one time, and a party who has not completely performed the whole of his own obligation complains of a failure on the other side, questions arise which may be of great difficulty. How far is the plaintiff bound to show performance of the contract on his own part, or readiness and willingness to perform? Or, to look at it from the other side, how far will a failure of one party to fulfil some part of his duties under the contract have the effect of discharging the other party from further performance, or the offer thereof, on his part? Such cases have been of increasing frequency and importance in recent times, especially with regard to contracts for delivery and payment by instalments. To a certain extent the difficulty is one of interpretation, for the modern decisions, at any rate, endeavour to find a solution in accordance with the true intent of the parties, although the difficulty is much increased by the general want of any specific evidence of that intent. Most contracts are generally made in good faith; and the parties do not necessarily, perhaps they do not usually, expect that all or any of the promises contained in the contract will be broken, or contemplate in any distinct way what will be the consequences of a breach.

"From Lord Mansfield's time to the present attempts have been made to lay down rules for determining, in the absence of

express provisions or other clear indication of intent, the relation of the one party's obligation to the other as regards the order of performance of mutual promises, and the extent to which either is bound to accept performance of part, notwithstanding failure to perform another part. In the earlier decisions the Courts inclined to treat the several terms of a contract, unless expressed to be dependent on the other party's performance, as separate and independent promises, paying little regard to the effect which default in some or one of them might produce in defeating the purpose of the contract as a whole. At this day the tendency is the other way. The Court looks to the purpose and effect of the contract as a whole, as a guide to the probable intention of the parties; and the presumption, if any there be, is that breach or default in any material term of a contract between men of business amounts to default in the whole.

"It must always be understood that questions of this kind are possible only where a contract consists of mutual promises. For if performance itself is the consideration for a promise, there is no contract at all, without performance. But when there is a contract made by mutual promises, we may have to inquire whether, in addition to each promise, or set of promises, being the consideration for the other, the performance thereof, on the one side is not a condition, precedent or concurrent, of the right to claim performance on the other. There is no logical reason why it should not be so, or why express words should be required to manifest an intention that it should."

I myself, however, prefer to put the case in another way, although in substance it is the same. It is manifest that the parties contracted on the basis that at least three patents should continue to be existing patents during the whole term of the licence. Owing to the conduct of the plaintiff, two, or at least one, of the patents were lost, with the result that a substantial part of the subject-matter of the contract was destroyed, and the contract, in a substantial part, became impossible of performance, and ceased to be binding.

There is ample authority for this. In the *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta-Percha, and*

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Telegraph Works Company (1), Lord Justice Mellish, at page 532, says :—

"No doubt it is a clear principle of law that if, by any act of one of the parties, the performance of a contract is rendered impossible, then the other side may, if they choose, rescind the contract, and certainly, according to the case of *Planchè* v. *Colburn* (2) and other cases, it appears sufficient, if the contract cannot be performed in the manner stipulated, though it may be performed in some other manner not very different." The principle so laid down is strikingly applicable to the present case. It is put in another way by Blackburn, J., in *Taylor* v. *Caldwell* (3):—"When from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived some particular specified thing continues to exist, so that when entering into the contract they must have contemplated such continued existence, as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but subject to the implied condition that the parties shall be excused, in case, before breach, performance becomes impossible, from the perishing of the thing without the default of the contractor."

This statement of the law covers the situation; and applies with all the more force when the disappearance of the subject-matter of the contract is owing to the default of the plaintiff.

Further down in his judgment, after reviewing several cases where the condition of performance was implied, he says, at p. 859 :—

"In none of these cases is the promise in words other than positive; nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is, by law, implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

(1) L. R. 10 Ch. App. 515.
(2) 8 Bing. 14.
(3) 3 B. & S. 833.

But, as against all this, I am confronted by the decision of the Court of Appeal in *Mills* v. *Carson* (1) already referred to. There it was held that the covenant on the part of the licensee of the patent to pay royalties was an independent covenant, and that the defendant's only right was to bring a counterclaim for the loss of the patent in consequence of the non-payment of the renewal fees, which for the purpose of the decision the Court assumed were payable by the owner of the patent. This case was pressed strongly and persistently by plaintiff's counsel; but the question involved was one of the particular contract, and cannot rule the construction of the present contract, which is materially different. I need only point to one feature of the contract in *Mills* v. *Carson* (1), which is not to be found in the present contract, viz., a covenant for quiet enjoyment, on which the judgment of the Court almost entirely turned. The Court, construing the contract principally by the light of that covenant, came to the conclusion that each party relied upon the obligations of the other, and the rights arising from a breach thereof, and that the performance did not enter into the consideration. In my opinion, *Mills* v. *Carson* (1) has no application.

There is one further point, in connexion with the lapse of the Austrian and French patents, or one of them, which requires special consideration. It was contended by the plaintiff that this only occasioned a partial failure of consideration; and that there must be a complete failure, to relieve the other contracting party from all liability. On the other hand, it was contended by the defendant that, in this case, the consideration was one and indivisible, that it was not severable, and that failure of any part meant a failure of the entire. Here again we are sent back to the contract to determine the nature of the consideration. If the royalties payable were only to be calculated by a percentage on the amount of work done, I would say that the consideration was severable, and capable of apportionment. For instance, on the lapse of the Austrian and French patents, the percentage on the work done under the English patent would be the sum to pay, under the altered circumstances. But in this case,

(1) 10 R. P. C. 9.

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there are fixed sums payable, for minimum royalties, in respect of all three patents. This minimum is not divisible among them. It might be earned out of all, or any two, or any one of them. Any one, or any two, of the patents might prove a commercial failure, but the licensee had any one of them to look to for his profit. There could not, then, be an apportionment of the consideration; and I am bound to hold that the consideration was one and indivisible. The authorities establish that, in such a case, failure of part is equivalent to failure of the entire, and entails a release of the contracting party: *Chanter* v. *Leese* (1); *Ellen* v. *Topp* (2); Williams' Saunders, pp. 554–555, 1871 ed. But, in my opinion, it was really unnecessary to rely on the argument based on indivisibility of consideration; because, if performance was a condition of the contract, the whole, or at least the substantial part, of the condition should be performed. There is nothing in the contract that any one of the patents was regarded as more important than the others; and I must hold that each of them was a substantial part of the subject-matter of the contract.

There is one other small matter which requires notice. The defendant counterclaimed for a sum of £52 12*s.* 9*d.* as money paid under a mistake of fact by him to the plaintiff. This sum is alleged to be the amount of income tax which the defendant ought to have deducted from the payments which he had made to the plaintiff on foot of royalties. I did not understand the defendant to press this counterclaim. There was no evidence given of any mistake having been made. The counterclaim must, therefore, be dismissed, without costs. The judgment of the Court must be, that the plaintiff's action be dismissed with costs to be paid by the plaintiff to the defendant.

Solicitors for the plaintiff: *Crawford & Lockhart.*
Solicitors for the defendant: *Carson & M'Dowell.*

W. L.

(1) 4 M. & W. 295, and 5 M. & W. 698.

(2) 6 Ex. 424, 427.

FIELD *v.* GRADY.

Barton, J.
1912.
Dec. 3, 10.

(1911. No. 605.)

Marriage settlement—Construction of—Annuity for wife to arise on certain events during the life of the husband and jointure after his death—Two severable annuities—Statute of Limitations.

By marriage settlement, lands held under freehold and chattel leases were conveyed to trustees on trust to permit the wife to receive and take out of the rents, issues, and profits thereof a yearly rentcharge or annuity of £100 sterling, during her life, in case she should survive the husband, or in case the husband should during her life become bankrupt or assign, charge, or encumber the said premises, or suffer something whereby the said premises or some part thereof would through his act or default, or by operation or process of law, become vested in some other person or persons, and subject thereto in trust for the husband. The husband, without the knowledge of the trustees or the wife, deposited the leases by way of equitable mortgage, and died more than twelve years afterwards. One of the leases contained a strict covenant against alienation.

Held (*a*) that the annuity, which arose when the husband encumbered the premises by depositing these leases with the bank, was barred; (*b*) that, at the husband's death, the widow became entitled to an annuity "in case she should survive her husband," which was in effect an independent annuity; and (*c*) that no estate passed by the settlement in the premises comprised in the lease, which contained a covenant against alienation.

Memorandum by the chief clerk for the opinion of the Court under the following circumstances:—

By marriage settlement dated 24th September, 1879, and made between Catherine Grady of the first part, Patrick Grady (the husband) of the second part, Anne Murray (the wife) of the third part, and James Burke and Thomas Murray of the fourth part, parts of the lands of Longwood, Derrinbig, Middlebrugh, and Blackditch in the barony of Upper Moyfrenrath, and county of Meath, were assigned to the said James Burke and Thomas Murray, their heirs, executors, administrators, and assigns, on trust after

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the solemnization of the said marriage, subject to certain charges, "to permit the said Anne Murray and her assigns to receive and take out of the rents, issues, and profits thereof, a yearly rentcharge or annuity of £100 sterling, during her life and [*sic*] in case she shall survive the said Patrick Grady, or in case the said Patrick Grady shall during her life become bankrupt or assign, charge, or encumber the said premises, or suffer something whereby the said premises or some part thereof would through his act or default, or by operation or process of law or otherwise, if belonging to him absolutely, become vested in some other person or persons, and subject to and charged as aforesaid in trust for the said Patrick Grady, his heirs, executors, administrators, and assigns."

The said lands were held under several leases, some freehold and some for terms of years. One of the leases (that of Blackditch) contained a clause against alienation without the consent of the landlord, which consent was not given till shortly before the hearing of this memorandum.

Anne Murray, shortly after the execution of the settlement of the 24th September, 1879, intermarried with Patrick Grady and lived with and was maintained by him on the settled property till his death. On the 4th November, 1881, Patrick Grady deposited the leases under which the settled property was held with the Royal Bank, without the knowledge or consent of either the wife or the trustees of the settlement, by way of equitable mortgage to secure the repayment of £200.

On the 22nd July, 1904, the plaintiff John Field registered a judgment mortgage against the interest of Patrick Grady in the lands.

On the 8th May, 1908, Patrick Grady died, and the lands having been sold under the order of the Court in this action (which was brought by John Field, to realize the amount of his judgment mortgage), a question arose as to the respective priorities of the bank as equitable mortgagees and Anne Grady, the rent chargeant under the settlement. The material questions which were submitted for the decision of the Judge were as follows:—

1. Whether the Royal Bank have priority in respect of their

equitable mortgage over the claim of the defendant in respect of her annuity—

(*a*) As regards all the premises comprised in the leases deposited with them.

(*b*) As regards the premises comprised in such of said leases as contained covenants against alienation.

2. Did the annuity in favour of Mrs. Grady, created by the marriage settlement, commence to run and be payable from the 4th November, 1881, or from the date of the plaintiff's judgment mortgage, or from the death of Patrick Grady?

3. If the said annuity in favour of Mrs. Grady arose on the deposit of the leases with the bank on the 4th November, 1881, is the said annuity barred and destroyed by non-payment since the date of such deposit, there being no evidence that same was ever paid?

4. If the annuity was payable during the lifetime of her husband, can the defendant claim the said annuity—

(*a*) As being unpaid and due for the period during which she was living with and supported by her husband, who was in receipt of the entire rents and profits of the lands on which the said annuity was charged?

(*b*) For the period since the death of her husband during which the defendant was entitled to the receipt of the rents and profits of the entire lands?

5. Did the deposit of the title-deeds or leases with the Royal Bank, without the knowledge of Mrs. Grady or the trustees, create an effective equitable mortgage on the lands?

R. Grove White, for the plaintiff.

Denning, for the defendant, Anne Grady.

The bank could only acquire by the deposit of title-deeds the interest of the depositor. That interest was subject to the annuity to Anne Grady. There was no negligence on the part of the trustees in not keeping the leases in their custody which would postpone them to the bank. They were not entitled to them as

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against Patrick Grady. Even if they had been guilty of laches, that could not affect the annuitant. As to the contention that the annuity is barred by the Statute of Limitations, the annuitant has been receiving support up to her husband's death, and from that date has been in receipt of the rents and profits of the lands. Further, the annuity is secured by an express trust, and is so saved from the statute: Lightwood, Time Limit on Actions, p. 163; *Drake's Estate* (1).

Serjeant Matheson, K.C., for the Royal Bank.

The annuity of £100 became payable on the deposit of the title-deeds in 1881. There has been no payment since on foot of it.

[BARTON, J.—Do you contend that there is only one annuity?]

There is only one annuity, but it springs up on the happening of various events.

At the time of the deposit the trustees were entitled to the custody of the title-deeds, and were guilty of laches in not keeping them.

With regard to the lease containing a covenant against alienation, nothing passed to the trustees of the settlement. It is true that the assent of the landlord relates back, but not so as to interfere with existing rights: Cherry's Land Acts, p. 34; *M'Grath* v. *Ahern* (2).

Dec. 10. BARTON, J.:—

The defendant became entitled, under the settlement in question, to a yearly rentcharge or annuity, when her husband encumbered the premises by depositing the leases with the Royal Bank by way of equitable mortgage. As she did not claim the annuity, or receive any payment on foot of it, or distrain, the annuity became barred. Even if it could be successfully contended that the annuity was secured by an express trust, no arrears would now be recoverable: *Hughes* v. *Coles* (3).

When her husband died, the defendant became entitled to an annuity in the nature of a jointure. As I construe the settle-

(1) [1909] 1 I. R. 136.
(2) 20 L. R. I. 341.
(3) 27 Ch. D. 231.

ment that is an independent annuity. The annuity which was to arise, if the husband encumbered, was for the husband's life. The extinguishment of that annuity would not deprive defendant of the annuity which was to arise under the settlement "if she should survive her husband."

The defendant is, in my opinion, entitled, in priority to the Bank, to a yearly rentcharge or annuity, which is charged upon all the premises, except the lands comprised in the lease of Blackditch. As regards the latter premises, no estate passed by the settlement, because the lease contained a strict covenant against alienation.

Solicitors for the plaintiff: *White & White.*
Solicitor for the defendant Anne Grady: *F. C. O'Reilly.*
Solicitors for the Royal Bank: *Orpen & Sweeny.*

E. C. F.

IN RE BIGGS-ATKINSON AND RYAN'S CONTRACT.

Barton, J.
1913.
Feb. 3.

(1913. No. 61.)

Vendor and purchaser—Conditions of sale—Title—Lands subject to rentcharges—Sale by tenant for life—Sale in lots—Power to charge moneys paid on foot of apportioned part of rentcharge on unsold lot—Settled Land Act, 1882, *sects.* 4 (3), 5, 20 (1), (2), 55 (2).

A tenant for life put up for sale by private treaty lands subject to a rentcharge, in six separate lots, subject to a condition that each lot would be sold subject to the entire rentcharge, but primarily liable for an apportioned part thereof, and that the purchaser of each lot should covenant for the payment of such apportioned part, and for the indemnity of the other lots as regards such apportioned part only, and should charge all moneys payable on foot of such covenant on such lot, and that the vendor for the purpose of such condition should stand in the place of, and be deemed to be, the purchaser of any unsold lot or lots.

Held, that this was a valid condition on such a sale.

SUMMONS under the Vendor and Purchaser Act, 1874. The facts so far as material were as follows:—By Indentures of Settlement, dated 22nd August, 1903, and 8th March, 1905, the lands of Coolderry and Ballyrickard South in the barony of Lower Ormond and County of Tipperary, comprising 464A. 2R. 13P., were conveyed to trustees on certain trusts, under which at the

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time of the sale hereinafter referred to Alice Marjory Biggs-Atkinson was tenant for life. All the lands were subject to an annual rentcharge of £92 6*s.* 2*d.*, and to two tithe rentcharges of £6 18*s.* 6*d.* and £10 15*s.* 6*d.* respectively, and the lands of Coolderry were also subject to a quit-rent of £1 4*s.* 8¼*d.*

In 1912 Alice M. Biggs-Atkinson as tenant for life under the settlement put up for sale by private treaty all the above lands in six separate lots, subject to certain printed particulars and conditions of sale. Lot 2, consisting of part of the lands of Coolderry, containing 23A. 1R. 20P., was described as "held in fee-simple subject to a quit-rent of £1 4*s.* 8¼*d.* per annum, but indemnified therefrom by lot 5, and subject to the said two tithe rentcharges of £6 18*s.* 6*d.* and £10 15*s.* 6*d.* per annum respectively, but indemnified therefrom by lot 1, and also subject to the said perpetual yearly rentcharge of £92 6*s.* 2*d.*, but indemnified against £86 16*s.* 2*d.* thereof by lots 1, 3, 4, 5, and 6, and primarily liable to £5 10*s.* thereof only. The total of the said outgoings to which this lot is primarily liable is £5 10*s.*"

Condition 9 stated that the vendor was selling as tenant for life under the power of sale given by the Settled Land Acts. Condition 10 was as follows:—"Lot 1 is subject, along with other lands, to a quit-rent of 19*s.* 10¾*d.* per annum; and lots 2, 3, 4, 5, and 6 are subject to a quit-rent of £1 4*s.* 8¼*d.* per annum. All the lots are, along with other property, liable to a tithe rentcharge of £6 18*s.* 6*d.* per annum and a lay tithe rentcharge of £10 15*s.* 6*d.* per annum, and to a perpetual yearly rentcharge of £100 late Irish currency, equivalent to £92 6*s.* 2*d.* present currency, created by an indenture of 18th March, 1806. Lot 1 will be sold subject to the said quit-rent of 19*s.* 10¾*d.*, and bound to indemnify the vendor and her successors in title therefrom, and also subject to the whole of both the said tithe rentcharges and bound to indemnify all the other lots against same. Lot 5 will be sold subject to the said quit-rent of £1 4*s.* 8¼*d.*, and bound to indemnify lots 2, 3, 4, and 6 against same. Each lot will be sold subject to the said rentcharge of £92 6*s.* 2*d.*, but primarily liable only for such portion thereof and with the benefit of such indemnities as are stated in the particulars. Each purchaser shall enter into covenants with the vendor for the payment of the

portion of the said rentcharge to which the lot purchased by loan is to be subject as stated in the particulars and for indemnification of the vendor against such parties; and the purchaser of lot 1 shall also enter into a covenant with the vendor for the payment of the said tithe rentcharges and the said quit-rent of 19*s.* 10¾*d.*, and for indemnification of the vendor against same; and the purchaser of lot 5 shall also enter into a covenant with the vendor for the payment of the said quit-rent of £1 4*s.* 8¼*d.* and for indemnification of the vendor against same. The purchaser of each lot shall be entitled to require the purchaser of each of the other lots, and shall be bound on the requisition of the purchaser of any other lot to enter into mutual covenants with the purchasers of such other lots for the payment of the covenanting parties' respective portions of the said rentcharge, and to enter into mutual covenants of indemnity in respect of the said portions of the said rent-charge, and to charge all moneys payable by them respectively under such covenants of indemnity upon the lot purchased by the covenanting parties respectively. The purchaser of lot 1 shall also be bound, on the requisition of the purchaser of any other lot, to enter into covenants with such purchaser to pay the said quit-rent of 19*s.* 10¾*d.* and the said tithe rentcharge, and to indemnify such other purchaser therefrom, and to charge all moneys payable to such other purchaser under such covenant of indemnity upon lot 1. The purchaser of lot 5 shall also be bound, on the requisition of the purchaser of any other lot, except lot 1, to enter into covenants with such purchaser to pay the said quit-rent of £1 4*s.* 8¼*d.*, and to indemnify such other purchaser therefrom, and to charge all moneys payable to such other purchaser under such covenant of indemnity upon lot 5. Each purchaser shall bear his own cost of making and entering into all such charges and covenants. If at the date of completion of the sale of any lot any other lot or lots is unsold, the vendor shall, for the purposes of this condition, stand in the place of and be deemed to be the purchaser of such unsold lot or lots."

By agreement dated 22nd October, 1912, Mrs. Julia Ryan agreed to purchase lot 2, which was the first lot sold. The purchaser took the objection that the Settled Land Acts gave no power to the tenant for life to carry out the transaction as set out in con-

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dition 10, as regards the unsold lands, by apportioning the rentcharges, as the vendor's own indemnity would only bind her life interest, and a charge by her of the moneys payable thereunder was invalid as against the fee-simple of the lands. The purchaser contended that the only way the sale could be carried out was under section 5 of the Settled Land Act, 1882, and for that purpose the consent of the owners of the rentcharges must be obtained. The vendor refused to do this, contending that that section had no application, and that a tenant for life had the power to make the charges referred to under the Settled Land Acts, and brought this summons for a declaration that the requisitions had been sufficiently answered.

A. V. Matheson, for the vendor:—

The purchaser's objection is that though if all the lots had been sold at the same time, the respective purchasers could have entered into the covenants and charges set out in condition 10, yet the tenant for life cannot make these covenants and charges in respect of any unsold lots.

The vendor here has power to sell in lots (S. L. A., 1882, sect. 4 (3)), and she has power to convey the lots in the manner requisite for giving effect to the sale (S. L. A., 1883, sect. 20 (1)), and to make, execute, and do all deeds, instruments, and things necessary or proper in that behalf (S. L. A., 1882, sect. 55 (2). This is the usual way of selling property in lots in Ireland. In England it is done by underleases, and it has been held in *Re Judd, Poland and Skelcher's Contract* (1), that that method is authorized by a trust for sale, and is in effect really nothing more than a way of carrying out a sale, and a necessary corollary to such a trust, though the trustees had no power of leasing. Cozens-Hardy, L.J., describes it as a mere piece of machinery for carrying out a sale. The same reasoning applies here. It would be impossible to sell this property otherwise than in lots, and it would be impossible to deal with the rentcharges except as has been done here. Sect. 5 of the S. L. Act has no application. That section only deals with a sale discharged from an incumbrance. This is not being done here. [He also cited *Re Doughty's Contract* (2).]

(1) [1906] 1 Ch. 684. (2) 15 L. R. I. 247.

A. Corbett, for the purchaser:—

This case is not touched by *Re Judd, Poland and Skelcher's Contract* (1), where the only question dealt with was the power to make underleases. That has not been attempted here. There is no power in the Act to give such a charge as is suggested. If the Legislature has omitted to give such a power, it cannot be read into the statute.

A. V. Matheson, in reply.

BARTON, J.:—

I do not see how this case can, in principle, be distinguished from *Re Judd, and Poland and Skelcher's Contract* (1). The tenth condition of sale is a usual condition applicable to a sale of property in lots in Ireland; and it was a proper and advantageous way of carrying out this particular sale. The provisions contained in the condition for apportionment constitute part of the machinery of the sale in lots; and if the tenant for life has the power to sell in lots, he has also, in my opinion, the power to carry out the sale by making the charge, in respect of unsold lots, which is provided for by the conditions.

Mr. Corbett referred to sect. 5 of the S. L. Act, 1882, but I cannot see how it affects the case. Section 5 is only applicable where part of the settled land is sold free from an incumbrance, which is not the case here.

The requisitions have been sufficiently answered; and the vendor will be entitled to the costs of the summons.

Solicitor for the vendor: *George H. Lyster.*
Solicitors for the purchaser: *Nolan & Dudley.*

E. C. F.

(1) [1906] 1 Ch. 684.

Wylie, J.
1912.
Nov. 28.
Dec. 3.
Appeal.
1913.
Jan. 22.

IN THE MATTER OF THE ESTATE OF REBECCA FINNEMOR; CONTINUED IN THE NAMES OF REV. CHARLES B. DOWSE AND GEORGE J. HORNIDGE, THE EXECUTORS OF THE WILL, DATED THE 8TH DAY OF DECEMBER, 1898, OF SAID REBECCA FINNEMOR, DECEASED.

Land Purchase code—Purchase agreement—Death of vendor—Variation in terms of sale—Executors of vendor—Powers of executors—Conversion—Ademption—Conveyancing and Law of Property Act, 1881, *sect.* 4.

A devised freehold lands to B, which were in the occupation of agricultural tenants. In 1905, A entered into a joint agreement in form "G", with all her tenants, ten in number, for the sale to them under the provisions of the Irish Land Act, 1903, of the fee-simple of their holdings. A died in 1907, without having altered her will. In 1909 the Estates Commissioners made an order declaring all the lands comprised in the agreement fit to be regarded as an estate, but subsequently refused to sanction the advance of the purchase-money in the case of one of the holdings.

On the hearing of a memorandum from the Estates Commissioners, held by the Court of Appeal (reversing the decision of Wylie, J.), that the executors of the vendor had no power to vary the terms of the sale of the estate, and that as B, the devisee of the lands, refused to consent to the exclusion of the holding in respect of which the Estates Commissioners refused to advance the purchase-money, the entire sale fell through.

THIS was a memorandum referred by the Estates Commissioners for the decision by the Judicial Commissioner of questions of law pursuant to the provisions of sect. 23, sub-sect. 1, of the Irish Land Act, 1903, as follows:—

1. Rebecca Finnemor, the vendor in the title named, being absolutely entitled to the lands of Ballywalterbeg, containing 249A. 3R. 27P., statute measure, situate in the barony of Ballaghkeen, and county of Wexford, held in fee-farm, by her will, dated the 8th day of December, 1898, devised and bequeathed the same to her nephew, John Butler Robinson, and to his heirs and assigns, for his and their own use absolutely. The said Rebecca Finnemor, on the 8th day of December, 1898, and on

the 9th day of May, 1901, executed codicils to her said will which did not in any way alter or revoke the said devise.

2. On the 25th day of July, 1905, the said Rebecca Finnemor entered into an agreement on Form "G" with the tenants on the said lands of Ballywalterbeg for the sale of the fee and inheritance thereof to them under the Irish Land Act, 1903, and the said agreement was duly lodged on the 14th day of August, 1905, in the proper office of this Court.

3. The said Rebecca Finnemor died on the 4th day of March, 1907, without having altered or revoked her said will, save so far as the same was altered by the said two codicils; and on the 9th day of May, 1907, probate of the said will and codicils was granted forth of the Principal Registry of the King's Bench Division (Probate), Dublin, to Rev. Charles B. Dowse and George J. Hornidge, the executors therein named.

4. On the 19th day of June, 1907, a conditional order was made by this Court to continue the proceedings herein as to pending sales in the names of the Rev. Charles B. Dowse and George J. Hornidge, as executors of the said Rebecca Finnemor; and the said John Butler Robinson having attended on the hearing of the application to have the said order made absolute, and having contended that the proceedings should be continued in his name, the question in whose name the proceedings should be continued was referred to the Judicial Commissioner, who, by his order dated the 8th day of December, 1908, declared that the proceedings should be continued in the names of the Rev. Charles B. Dowse and George J. Hornidge as such executors as aforesaid, and that the said John Butler Robinson should have notice of any intended change in the purchase-agreements herein before the sanction of the sales.

5. On the 15th day of October, 1909, the Estates Commissioners by order declared that the lands included in the so originating application were fit to be regarded as a separate estate.

6. The Estates Commissioners caused the said lands of Ballywalterbeg to be inspected in the month of July, 1909, and intimated their willingness to sanction the full advances applied for by the tenants in all cases, save that of the tenant, Patrick Burke, who agreed to purchase his holding for the sum

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of £152, and in his case the Estates Commissioners refused to advance more than £127, being £25 less than the amount of the advance applied for by the said Patrick Burke.

7. The said John Butler Robinson having cautioned the said Rev. Charles B. Dowse and George J. Hornidge against accepting the said reduced advance, alleging that they were not entitled to do so, and that such acceptance might prejudice his rights under the said will, the following question was, amongst others, referred to the Judicial Commissioner, viz. :—

"Are the executors of the said Rebecca Finnemor entitled to accept the reduced advance in the case of Patrick Burke's holding, which the Irish Land Commission is willing to make ?" And the Judicial Commissioner by his order dated the 26th day of October, 1911, answered the said question in the negative.

8. No further proceeding has been taken in the matter, and none of the said lands have been vested, nor has the purchase-money been placed to credit.

9. The said John Butler Robinson has now cautioned the said Rev. Charles B. Dowse and George J. Hornidge against proceeding with the sale of the remaining holdings, alleging that they are not entitled to do so, and that the said agreement for sale entered into by the said Rebecca Finnemor cannot now be carried out.

10. The following documents shall be deemed to be incorporated in this case, that is to say, the agreement for sale dated the 25th day of July, 1905, the probate of the will and codicils of the said Rebecca Finnemor granted on the 9th day of May, 1907, the orders in this matter of the 8th day of December, 1908, and the 26th day of October, 1911, and the ruling of the Estates Commissioners as to the advance in the case of Patrick Burke, the reply thereto of the vendor's solicitors, dated the 13th day of January, 1910, and further ruling dated the 31st day of January, 1910.

11. The following questions of law are submitted by the Estates Commissioners at the request of the said John Butler Robinson :—

1. Can the said agreement for sale of the 25th day of July,

1905, entered into by the said Rebecca Finnemor with her said tenants, or any and what part thereof, be now carried out?

2. If the said agreement for sale can now be carried out, are the executors or trustees of the said Rebecca Finnemor entitled to proceed with and complete the sale of the said holdings, other than that of the said Patrick Burke, to the respective tenants thereof?

3. By whom, or out of what fund, should the costs of and incidental to this case stated be paid or borne?

[Subsequent to the submission of these questions, the Estates Commissioners again refused to sanction the advance of £152 applied for by Patrick Burke.]

Leech, K.C., for John Butler Robinson.

M. G. Longfield, for the executors of the vendor.

WYLIE, J.:— Dec. 3.

The vendor in this matter, being entitled in fee to the lands of Ballywalterbeg, by her will, dated the 8th day of December, 1898, devised the said lands to John Butler Robinson. On the 25th day of July, 1905, she entered into an agreement, with all the tenants, ten in number, on the said lands for the sale to them of their respective holdings under the Land Purchase Acts, and the said agreement was duly lodged with the Land Commission on the 17th day of August, 1905. The vendor also lodged the usual originating application for the purpose of carrying out the said sales, and thereby applied to have the entire of the said lands declared a separate estate for the purposes of the Irish Land Act, 1903. She died on the 4th day of March, 1907, and, on the 19th day of June, 1907, an order was made continuing the proceedings in the names of her executors, who are, under sect. 4 of the Conveyancing Act, 1881, the proper parties to carry out the sale. On the 15th day of October, 1909, the Estates Commissioners declared the lands fit to be regarded as a separate estate. Subsequently the Estates Commissioners intimated to the parties their willingness to sanction the advances applied for by all the tenants except Patrick Burke, who had applied for an advance of £152, the price agreed upon, and stated that, in his case, they could

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only advance £127. John Butler Robinson having cautioned the executors against accepting the reduced price in the case of Patrick Burke, the Estates Commissioners submitted to me the following question :—Are the executors of the vendor entitled to accept the reduced advance in the case of Patrick Burke? And, it appearing to me that the statutory power of the executors was limited to carrying out the contract of sale as entered into by the testatrix, I answered the question in the negative. The Estates Commissioners, accordingly, definitely refused to sanction the advance in the case of Patrick Burke. John Butler Robinson then cautioned the executors against proceeding with the sales to the other nine tenants, and the Estates Commissioners have now submitted to me the following questions :—(1) Can the agreement for sale, of the 25th day of July, 1905, entered into by the vendor with her said tenants, or any and what part thereof, be now carried out ; and (2) If the said agreement for sale can now be carried out, are the executors of the vendor entitled to proceed with and complete the sale of the holdings, other than that of Patrick Burke, to the respective tenants thereof? I do not know why these questions are put separately, but I shall deal with them as one.

Now, the main argument of Mr. Leech, on behalf of John Butler Robinson, was based upon the fact that the agreements for purchase by the tenants of their respective holdings were combined in one document, headed "joint agreement between vendor and several tenants for the sale of their holdings," his contention being that this form of agreement imported into each of the tenants' agreements a condition that it should become void if any of the other agreements could not be carried out ; that, in fact, it was one agreement for the sale of all the holdings or none.

Now, at the time this agreement was entered into, there were two forms of agreement provided by the Estates Commissioners for use by vendors. One form was for the case of each tenant entering into a separate and distinct agreement for the purchase of his own holding, but it contained a clause making it conditional upon an estate, of which the holding formed a part, being sold. The other form was the one used in this case, called a "joint

agreement," which could only be used for tenants on one townland not exceeding twenty-five in number, and where there were no special incidents affecting the holdings or tenancies, and where each tenant applied for the whole purchase-money. It is obvious, therefore, that this form was only provided for, and allowed to be used in, the special simple cases referred to, merely for the convenience of the parties, and, though called a "joint agreement," was never intended to modify or affect the several agreements of the tenants as separate and distinct agreements for purchase. It is only "joint" in the sense that the several agreements are combined in the one document. It is plain from its terms that each clause must be read distributively in respect of each holding comprised in the schedule to the agreement, and that the clause on which Mr. Leech relied so strongly in support of his contention, *i.e.*, clause 1, is, in my opinion, dead against him. It is in these terms:—"In case *an* estate of which said holdings *form a part* shall be sold under the provisions of the Irish Land Act, 1903, the vendor hereby agrees to sell, and *each* of the said tenants hereby agrees to purchase, the holding described in the said schedule opposite the name of each such tenant respectively, for the respective sums specified." Now, the agreement is expressed to be made between the vendor of the above-named estate and the several tenants of the said estate whose names are subscribed thereto, and who are severally in exclusive occupation of the holdings described opposite the name of each tenant. These holdings made up the entire of the said estate; and clause 1, to which I have referred, does not say, "in case the said estate comprising said holdings shall be sold," but "in case an estate of which said holdings form a part shall be sold," which must be read, in order to make it sense, "in case an estate of which said holdings respectively form a part shall be sold"; and, reading it thus, the clause is precisely equivalent to the corresponding clause in the other form provided for a separate and distinct agreement by each tenant.

In my opinion, therefore, the rights of the several tenants in respect of their several agreements for purchase are in no way affected by the fact that their agreements are combined in one document called a "joint agreement."

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But the question still remains, supposing ten tenants sign ten separate and distinct agreements for the purchase of their holdings on the forms provided by the Estates Commissioners, and the vendor lodges an originating application applying that the lands comprised in all the said holdings be declared a separate estate, and the Estates Commissioners make such declaration, but subsequently refuse to sanction the advance to one of the ten tenants, whose agreement is thereby made void, can the Estates Commissioners then proceed, on the application of the vendor, to amend the declaration by comprising therein only the holdings of the nine other tenants, and carry out the sales to them? Why, this is their every-day practice; and if they could not do it, land purchase would come to an end, because, according to the decision of the Court of Appeal in *In re Weir's Estate* (1), the declaration of the estate must be made by the Estates Commissioners before they can decide the question of sanctioning or refusing to sanction the advances.

I have no doubt, therefore, that, in such a case, the Estates Commissioners can, on the application of the vendor, amend the declaration by excluding the holding the sale of which has failed. If, therefore, in this case, the vendor were still alive, she could carry out the sales to the nine tenants according to her agreements, by simply applying to the Estates Commissioners to amend the declaration of the estate, and, if necessary, the originating application.

But the question still remains, could she be compelled to make such application? Could the nine tenants, in such a case, enforce specific performance of their agreements? I think they could, unless it was a condition of their agreements that the other agreements should also be carried out. This being so, the vendor's executors are now at liberty, if indeed not bound, to take all necessary steps to carry out the agreements entered into by the vendor, so far as they can now be carried out.

My answer, therefore, to the two questions together is, "Yes, if the executors apply to have the declaration amended by excluding Patrick Burke's holding, and if the Estates Commis-

(1) [1908] 1 I. R. 161.

sioners make the amendment accordingly, and sanction the advances applied for by the other nine tenants."

I would like to add, with reference to my decision in *In re Hewson's Estate* (1), which Mr. Leech seemed to think governed this case, that what I decided there was, that the Estates Commissioners could not make or amend a declaration excluding a holding, and carry out the sales of the remaining holdings, without the consent of the vendor. If they did, they would be exercising a jurisdiction to enforce specific performance which they have not got. The right of the tenants to enforce specific performance is another matter. J. E. W.

J. B. Robinson appealed (2).

Leech, K.C., for the appellant:—

I admit that the executors of the vendor would, under section 4 of the Conveyancing Act, 1881, have had power to convey the lands, if there had been a contract for the sale of the lands subsisting at the vendor's death enforceable against her heir or devisee. There was, however, no such enforceable contract for the sale of nine holdings here, and once the original contract was departed from by the exclusion of one of the holdings, the matter was at an end, and the executors of the vendor had no power to consent to the carrying through of a new contract. The agreement here was in the old Form "G," *i.e.*, it was a joint agreement signed by all the ten tenants on the estate, but even if each tenant had signed a separate agreement in Form "F," which is the form now in use, the result would have been the same, as in each case the "estate," on the sale of which under the Act of 1903 the agreement is made conditional, is the entire estate of the vendor specified in the originating application, and no other or lesser estate. It follows, whether the contract for sale subsisting at the vendor's death was conditional or not, that the agreement was to sell the entire ten holdings for £3091, not nine holdings for £2939, and the only power of the executors of the vendor under section 4 of the

(1) 42 I. L. T. R. 48.

(2) In the Court of Appeal before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

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Conveyancing Act, 1881, would have been to carry out the subsisting agreement, and they had no power to vary it. The vendor herself could not have been compelled to sell portion of her estate, and probably would have refused to do so if asked, as no owner of an estate wishes to be left with one holding on his hands, and that an inferior one, or to consent to a sub-division of sporting and mineral rights.

The present decision of Wylie, J., is inconsistent with that in *Hewson's Estate* (1), where the learned Judge himself decided that the Estates Commissioners had no power, against the will and without the consent of the vendors, to declare part of the lands comprised in an originating application to be an estate, and to proceed with the sale of such portion. It follows that where, as in the present case, the only person who could consent to a variation in the terms of the agreement is the devisee of the lands, who refuses his consent, the sale falls through, and the appellant is entitled as devisee to the lands, there having been no conversion or ademption.

M. G. Longfield, for the respondents :—

The fallacy underlying the argument of appellant's counsel arises from the meaning given by him to the expression "estate." This is used in various senses; in popular language as meaning property, in its legal sense as denoting the *quantum* of interest of an owner, as where an "estate tail" is spoken of; but in the Act of 1903, the expression is, by sect. 98 (1), defined as meaning "any lands which the Estates Commissioners may declare fit to be regarded as a separate estate for the purposes of this Act." It is to aid the sale of such an "estate" that the *bonus* is granted, and the condition attaching to purchase agreements, whether in Form "F" or Form "G," is that such an "estate," of which the holding of the purchasing tenant forms part, should be sold under the provisions of the Irish Land Act, 1903. In the present case, although all the ten tenants signed one document, there were, in effect, ten separate agreements, each of which, though at first conditional, would have become a binding agreement once an

(1) 42 I L. T. R. 48.

"estate" should be sold under the Act of 1903, comprising the holding in respect of which the individual tenant's agreement was signed. That there were ten agreements, not one, is shown by the wording of the agreement itself. By clause 1 of Form "G," the vendor agrees to sell, and each tenant agrees to purchase his own holding; by clause 3, each tenant applies for the advance of the purchase-money applicable to his own holding; each holding is to be individually vested in the purchasing tenant; the various holdings may be vested at different times; and interest in lieu of rent is to be paid by each tenant until the date of the advance to him, and thereafter a purchase annuity. There is nothing in the joint agreement to suggest an implied term that the agreement would not be binding unless all the holdings were to be included in the estate sold.

If the expression "estate," in this agreement, is to be given the meaning contained in sect. 98 (1) of the Act of 1903, then, as regards nine of the holdings, the condition of an "estate" comprising them being sold under the provisions of the Act of 1903 will be fulfilled if the Estates Commissioners make an order declaring these nine holdings an estate, and advance the purchase-money therefor, as they are willing to do; their order to that effect will relate back to the original agreement, and the executors of the vendor are accordingly the proper parties to carry out the matter, and to receive the purchase-money.

Leech, K.C., replied.

THE LORD CHANCELLOR:—

This is an important case, and it is a remarkable thing that, since the Act of 1903, no previous case has arisen involving the present point, the determination of which, in my opinion, depends upon the interpretation of section 4 of the Conveyancing Act of 1881.

As the lands in question were real estate, the executors of the deceased were strangers to the lands, save in so far as there was a contract subsisting at the death of the vendor, enforceable against her heir, or devisee, for the sale of the fee-simple. If there had been in the present case such a contract subsisting,

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the executors of the vendor would have had conferred upon them by the section I have mentioned, a definite and express power to convey the lands "in any manner proper for giving effect to the contract."

Beyond that the executors had, in my judgment, no power over the lands; they could not regulate the course of the contract, or vary it in any degree; they could only exercise the special limited power prescribed by section 4 of the Conveyancing Act of 1881, viz., to give effect to a contract subsisting at the death of the vendor.

It is to be regretted that the original agreement between the vendor and her tenants in the present case cannot be carried through, but that is impossible owing to the Estates Commissioners having refused to declare the entire ten holdings an estate, and to advance the purchase-moneys therefor; and, as the executors of the vendor had no power to alter or vary the original agreement, it follows that the judgment of Wylie, J., cannot be supported, and the appeal must be allowed.

Holmes, L.J.:—

I think that the oversight of Wylie, J., in this case has been that he has regarded the executors of the vendor as if they were themselves vendors having exactly the same authority and powers as the original vendor herself.

I take it that the executors are willing to have what is asked for done; but the question is, whether by giving their consent they can enable it to be carried out. Their authority arises under the 4th section of the Conveyancing Act, 1881.

[His Lordship read the section and continued.] Now, at the time of the death of the vendor in this case, there was subsisting a conditional contract for the sale of their holdings not merely to a single tenant, but to a number of tenants all of whom had signed a single document, which has been relied upon by Mr. Leech as a "joint agreement for sale." Now that conditional contract would have become a binding contract if the Estates Commissioners had declared the lands comprised in the agreement fit to be regarded as a separate estate, and had sanctioned the advance of the purchase-money, and if the executors were here

asked to carry out such a binding contract in its entirety they would be entitled to do so. But what is now sought to be carried out was not a contract subsisting at the date of the vendor's death at all, nor enforceable upon her heir or devisee. It is an entirely different contract which is sought to be enforced; and, in my view of sect. 4 of the Conveyancing Act of 1881, there is no power to enforce it.

CHERRY, L.J.:—

I base my decision in this case on the express wording of the agreement between the parties. We have been told that Form "G" has been abandoned, and that a different form is now in use; and it has been suggested that our decision in this case may affect other cases in which the new form of agreement is used. I, however, decide the case on the particular agreement in Form "G," which is before the Court, and I express no opinion as to what the result might be if the tenants had signed separate agreements in Form "F." An agreement under the Land Purchase Acts must be construed upon the same principles as any other agreement for the sale and purchase of land.

Form "G" is headed "Joint agreement between vendor and several tenants for the sale of their holdings," and the first clause is as follows:—"An agreement made between A. B., the vendor of the above-named estate, and the several tenants of the said estate, whose names are subscribed hereto, and who are severally in exclusive occupation of the holdings described opposite the name of each such tenant in the schedule hereunto annexed."

The agreement in the form now before us was, to my mind, one single contract between the vendor and the tenants. Its binding effect on the vendor was conditional upon the Estates Commissioners declaring all the holdings specified in the schedule fit to be regarded as a separate estate for the purpose of the Land Purchase Acts, and sanctioning an advance of the purchase-money agreed upon for each of the holdings. If these conditions were not fulfilled *in toto*, the vendor was released from her bargain, and was free to sell any portion of her estate or not as she thought fit. At the date of the death of the vendor in 1907 the Estates Commissioners had not then decided whether they would declare

Appeal. 1913. *In re* FINNEMOR'S ESTATE. Cherry, L.J.

the lands an estate and advance the purchase-money; but in the year 1909 they did make an order declaring that all the lands comprised in the agreement formed an estate. If the matter had rested there, and if the full amount of the purchase-money agreed upon could have been paid by the purchasers, either by means of an advance by the Land Commission or out of their private resources, I think it is clear that this contract would have become absolutely binding, and would properly be enforced now.

The Estates Commissioners, however, subsequently refused to make the advance of the purchase-money in the case of one of the holdings, and after negotiations had taken place it was found necessary to exclude this holding from the estate. Now that exclusion from the estate of one of the holdings would, in my opinion, have entitled the vendor, if alive, to repudiate the entire contract; she could have refused to consent to a sale of part only of the lands which she had agreed to sell. She could not have been compelled to make a new contract at a different price.

What, then, were the powers of the vendor's executors after her death? They had no power to vary the terms of the sale, nor had they any general power of sale which would enable them to enter into a new contract. Their only power was to convey the lands so as to carry out a contract which was subsisting at the death of the vendor and enforceable as against her heir or devisee. That is the only power conferred upon them by the 4th section of the Conveyancing Act, 1881.

At the date of the death of the vendor in the present case there was no such subsisting contract for sale; the contract that did exist was a conditional one only, and the conditions necessary for it to become a binding contract were never fulfilled.

It is clear, therefore, that on the true construction of the 4th section of the Conveyancing Act, 1881, the executors had no power whatever to carry out the contract which is now sought to be enforced. The first question in the memorandum need not be dealt with by us, and the second question must be answered in the negative.

Solicitor for the appellant: *E. C. Jameson.*

Solicitors for the respondents: *Cathcart & Hemphill.*

R. ST. J. C.

IN THE MATTER OF THE ESTATE OF REV. GEORGE ALEXANDER KING FINLAY.

Wylie, J.
1913.
Jan. 13, 16, 17, 21.

Will—Construction—Devise to one and "his lawful eldest male issue"—Gift over "in default of male issue . . . and not attaining lawful age"—Nomen collectivum.

A testator, by his will made in 1848, devised fee-simple lands to trustees "for the use of my grandson G., . . . and his *lawful eldest male issue*, . . . and *in default of male issue of the said G., and not attaining lawful age, in that case then to go to* my grandsons D. and H. in equal divisions, and their lawful heirs."

Held, that the words "lawful eldest male issue" should be construed as *nomen collectivum*, the word "eldest" indicating the order of succession; and, accordingly, that G. took an estate in tail male.

Lovelace v. *Lovelace* (Cro. Eliz. 40), and *Sheridan* v. *O'Reilly* ([1900] 1 I.R. 386), distinguished.

Lewis v. *Puxley* (16 M. & W. 733), and *Doe* d. *Tremewen* v. *Permewen* (11 A. & E. 431), applied.

QUESTION OF LAW submitted for the decision of the Judicial Commissioner, by direction of the Examiner.

By his will, dated the 21st July, 1848, George Finlay devised certain lands held in fee-simple, including the lands of Corcomley, Tullytrasna, and Tullywam (being the lands sold in this matter), and the lands of Corrvilla, held under lease for ever, all situated in the Parish of Templeport, and county of Cavan, to his trustees upon trust as to all the said lands other than the lands of Corcomley, Tullytrasna, and Tullywam, out of the rents and profits thereof, to pay to his wife, Helena Finlay, an annuity of £100 during her life, and to his daughters, Susanna and Helena Catherine Finlay, annuities of £50 each for the terms of their natural lives, and to his eldest son, William Henry Finlay, an annuity of £25 for the term of his natural life, and subject thereto to hold the lands thereby made subject to the said annuities, except Corrvilla, to the use of his third son, Francis Finlay, his heirs, executors, administrators, and assigns for

Wylie, J. 1913.

In re Finlay's Estate.

ever, and as to the said lands of Corrvilla to the use of the said Francis Finlay for his life, and from and after his decease, to the use of his grandson, George Finlay, eldest son of James Alexander Finlay, deceased, and his eldest lawful male issue and his heirs for ever; but, in default of such issue not attaining lawful age, then to the use of his grandson, George Henry Finlay, eldest son of William Henry Finlay, and his heirs for ever. And as to the lands of Corcomley, Tullytrasna, and Tullywam, testator proceeded—"I leave and bequeath same in trust, as hereinbefore mentioned, *for the use of my grandson, George Finlay,* eldest son of James Alexander Finlay, deceased, *and his lawful eldest male issue,* subject to a rentcharge of £60 to his mother, Eliza Finlay, for her life . . . *and in default of male issue of the said George and not attaining lawful age, in that case then to go to* my grandsons, David Lake Finlay (brother to the said George), and George Henry Finlay (eldest son of William Henry Finlay), in equal divisions, and their lawful heirs." And (amongst other provisions) as to the lands of Corrvilla, thereinbefore devised to his son, Francis Finlay, for his life, testator declared it to be his will and desire that the said Francis Finlay should maintain and uphold the buildings and improvements thereon. And further, that, in case any loss should thereafter be sustained in regard to his real estate, or any part thereof being impeached, evicted, or damnified, such loss (if any) together with any costs attending same, should be borne in rateable proportions by his said son, Francis, and his grandson, George Finlay, their heirs, executors, administrators, and assigns, as inheritors of such property, and fair compensation be made by one to the other, according to the respective proportions of their inheritances.

Testator made two codicils to his will which did not affect the said devises, and died on the 23rd January, 1855.

By an indenture, dated the 9th October, 1856, which was duly enrolled, reciting the then intended marriage between George Finlay (therein described as the Rev. George Finlay) and Isabella King (which was shortly afterwards solemnized), and that the Rev. George Finlay was then seised in tail male in possession of the hereditaments thereby intended to be granted, the said lands of Corcomley, Tullytrasna, and Tullywam were granted to a trustee

to hold the same for ever free and discharged of all estates tail and limitations over, and after the solemnization of the said intended marriage, to the use of the Rev. George Finlay for his life, and after his decease to the use that Isabella King should receive a rentcharge of £30 during her life, and, subject thereto and to a term of years for securing the same, to the use of the heirs and assigns of the Rev. George Finlay.

There was only one child issue of the marriage, George Alexander King Finlay, the vendor in this matter.

By disentailing deed, dated the 26th January, 1881, George Alexander King Finlay purported to bar his estate tail in remainder in the said lands of Corcomley, Tullytrasna, and Tullywam.

Isabella Finlay, otherwise King, died on the 9th March, 1888, and subsequently the Rev. George Finlay married Helen Finlay.

By his will, dated the 15th December, 1904, the Rev. George Finlay purported to leave his property in the county of Cavan to his son George; and by a codicil thereto, testator confirmed his said will save as regards his county Cavan property, which he thereby purported to leave to his wife, Helen Finlay, for her life (having, he stated, power to do so, having cut off the entail many years ago), and, after her death, over. Testator died on the 9th February, 1905, whereupon George Alexander King Finlay entered into receipt of the rents and profits of the said lands of Corcomley, Tullytrasna, and Tullywam, as absolute owner, the devise thereof contained in the codicil to the will of the Rev. George Finlay being treated as a nullity.

George Alexander King Finlay afterwards became of unsound mind, and by order of the Lord Chancellor, dated the 29th October, 1908, it was declared to be just and reasonable and for his benefit that the said lands should be sold to the occupying tenants under the Land Purchase Acts, on the terms therein mentioned. The sale had since been carrried out, and the purchase-money advanced.

The following question was submitted:—Whether on the true construction of the devise in the will of George Finlay of the said lands, his grandson, George Finlay, took an estate for life, or an estate in tail male?

Wylie, J. 1913.

In re FINLAY'S ESTATE.

Garrett Walker, K.C., for the vendor :—

The *prima facie* meaning of "eldest male issue" is "eldest son' Jarman on Wills (ed. 1910), p. 1604. The use of the word "eldest" shows that "issue" is a word of purchase, and points to the eldest son as a *persona designata* : *Lovelace* v. *Lovelace* (1); *Sheridan* v. *O'Reilly* (2). On the true construction of the devise, George Finlay, the grandson, took an estate for life, and subject thereto the vendor, as his only son, took an absolute estate in fee. [Counsel referred to the Wills Act, s. 28.] The true method of construction is to take the original gift and see what it means, then to construe the gift over by reference to it. "Male issue" in the gift over must be construed by reference to "eldest male issue" in the original gift. If necessary, the Court should read in the word "such" before the words "male issue" in the clause commencing "in default of male issue": see cases cited in *Hamilton* v. *West* (3). This case shows that where superadded words of limitation narrow the course of descent they convert even "heirs of the body" into words of purchase. The use of the word "eldest" negatives an intention to create an estate tail. The Examiner has referred me to *Doe* d. *Tremeven* v. *Permeven* (4). That case shows that reference to age is inconsistent with the creation of an estate tail. Having regard to the date of the will, the provisions of section 29 of the Wills Act, and the reference to age in the gift over, it is impossible to suggest that an indefinite failure of issue can be referred to in the gift over. Accordingly, these words cannot be construed as affecting the definite gift in the direction of giving the first taker an estate in tail male. In many wills since the Wills Act the existence of such words in a gift over, with their statutory meaning, has been relied on in aid of the construction that the first taker took as a purchaser: *Sandes* v. *Cooke* (5); *Warren* v. *Travers* (6). Unless the gift over depends upon an indefinite failure of issue, it is impossible to construe the original gift as creating an estate tail: *Van Grutten* v. *Foxwell* (7).

(1) Cro. Eliz. 40.
(2) [1900] 1 I. R. 386.
(3) 10 Ir. Eq. R. 75.
(4) 11 A. & E. 431.
(5) 21 L. R. Ir. 445.
(6) I. R. 2 Eq. 455.
(7) [1897] A. C. 658.

Hewitt Poole, for Helen Finlay :—

From the scheme of the will it is evident that the testator intended George Finlay to take some greater estate than a life estate. He gives Francis Finlay an estate for life in Corrvilla, with remainders over, and then, bearing in mind this fact, imposes on him the liability for upkeep. He does not impose this liability on George Finlay. And further, in the provision he makes that any loss that should be sustained in regard to his real estate should be borne by his son Francis and his grandson George, "as inheritors of such property . . . . according to the respective proportions of their inheritances," he shows that he thought he had given estates of inheritance in all the lands. The Court is bound to give technical words their technical meaning unless by so doing it would defeat the intention of the testator. No doubt, the *prima facie* meaning of "eldest male issue" is "eldest son." But the intention of the testator, as expressed in the gift over, was that the estate should only go over in the event of all the male issue of George dying under the age of twenty-one. *Doe* d. *Tremewen* v. *Permewen* (1) shows that the words used taken all together must be construed with reference to intention. The Court is entitled to construe the original gift by reference to the gift over for the purpose of explaining the ambiguous meaning of "eldest male issue." The expression "lawful eldest male issue" is capable of being construed, and should be construed, as "lawful male decendants," and as giving an estate tail to the ancestor. In using the word "eldest" the testator had in his mind the order of seniority. In *Lewis* v. *Puxley* (2), a testator gave his real estate to his eldest son John for his life, and to his eldest legitimate son after his death, and, in default of such issue, he gave it in like manner to his son Richard, and, in case that he had no legitimate issue male, then over. It was held that John took an estate in tail male. The same argument was used there as here that the word "such" should be read in before "legitimate male issue," but the Court refused to accede. There the expression "eldest legitimate son" was construed as *nomen collectivum*. In the present devise

(1) 11 A. & E. 431. (2) 16 M. & W. 733.

Wylie, J. 1913.

In re FINLAY'S ESTATE.

the expression "eldest male issue" is more readily capable of the same construction. With reference to the use of words of limitation in the devise of Corrvilla, even if these words had been used in the present devise, it does not follow that the issue of George would have taken as purchasers: *Goodwright* v. *Pullen* (1).

Garrett Walker, K.C., in reply:—

In the devise of Corrvilla, the words "eldest male issue" must mean "eldest son" living at the death of George Finlay, as a *persona designata*. In the present devise the same words should be given a similar construction.

Jan. 21.

WYLIE, J.:—

The question in this case is—whether, under the will of George Finlay, made in 1848, his grandson, George Finlay, took an estate for life or an estate in tail male? The devise is in these terms:—As to the lands in question, "I leave and bequeath same in trust for the use of my grandson, George Finlay, eldest son of James Alexander Finlay deceased, and his lawful eldest male issue . . . . and, in default of male issue of the said George and not attaining lawful age, in that case then to go to" two other grandsons and their lawful heirs.

Now the only difficulty in the case arises from the use of the word "eldest" in the devise to the male issue. If the devise had been to George Finlay and his lawful male issue, and, in default of male issue, over, there could be no question but that George would take an estate in tail male. But Mr. Walker contends that it is impossible to construe "his lawful *eldest* male issue" in any other sense than as a *descriptio personæ*, viz.: of his eldest son, and, if this were so, the eldest son, who was not born at the date of the will, would take as a purchaser on the death of his father, who would, in such case, only take a life estate.

Two cases were relied upon by Mr. Walker, as conclusive on this point, and they are apparently the only reported cases in which the words "eldest male issue" are used in such a

(1) 2 Lord Raymond, 1737.

connexion. The first is that of *Lovelace* v. *Lovelace* (1). The entire report is this—"Waste. The case was J. S. being seized in fee of land, devised it to J. D. and to his *eldest* issue male (he having no son at that time). It was adjudged no estate tail, but for life only; and if he then had a son, it was all one; but a devise to one and his issue male is an estate tail; but here the word *eldest* will not permit that construction."

Now no reasons are given for that decision, and its correctness has been questioned; though in *Sheridan* v. *O'Reilly* (2) the Master of the Rolls would seem to have regarded it as not overruled. But, whether that decision was right or wrong, the case differs materially from the present in this, that there was nothing in the will in that case, except the words of limitation themselves, to show in what sense the testator intended to use them.

In *Sheridan* v. *O'Reilly* (3), the second case relied upon, a testator bequeathed his property to trustees upon trust that the rents and profits should be divided into five equal parts, to be paid to each of his five nephews share and share alike "to be by them enjoyed during the period of their natural lives, and after the decease of each to their eldest male issue, respectively, of each, and in default of such male issue such share to revert to the remaining legatees, or their eldest male issue, to be divided equally among them." The Master of the Rolls, holding first that the gift of the rents gave the *corpus*, held that the gift, after the decease of each to their eldest male issue, meant to the eldest male issue living at the decease of each. An appeal was taken on the ground that "eldest male issue" meant eldest son born, and not eldest son living at the death of the father, and so the Court of Appeal held. But the question as to whether each of the nephews took an estate for life or in tail was not raised in the Court of Appeal, it being the common case of both parties in that Court that eldest male issue meant eldest son.

This case again differs in several material respects from the present case. There, the gifts to the nephews were expressly limited "to be by them enjoyed during the period of their natural lives, and, after the decease of each, to their eldest male

(1) Cro. Eliz. 40. (2) [1900] 1 I. R. at p. 389. (3) *Ibid.*, 386.

Wylie, J. 1913. *In re* FINLAY'S ESTATE.

issue." Here, it is simply "to George Finlay, and his lawful eldest male issue." There, the devise over was "in default of *such* male issue." Here, it is "in default of male issue" of George attaining twenty-one. There, it was a gift of a mixed property the greater part of which was personalty. With reference to this, the Master of the Rolls says (1), "I am clearly of opinion that in the case before me, so far as the personal estate is concerned, the eldest male issue must be treated as a purchaser; that is that the gifts to the nephews were for life only with executory gifts over on the death of each without issue." And further on he says, "I cannot but think that when realty and personalty are, as here, blended in one gift, that circumstance should aid the construction as to realty which must be placed upon the same word in dealing with personalty."

It seems to me, therefore, that neither of these cases can be regarded as a decision that "eldest male issue" must mean eldest son, if there be a context in the will which shows that the testator did not intend to use the words in that sense.

But suppose for a moment that "eldest male issue" must be read eldest son, then, according to Mr. Walker's contention, the devise will run thus—to George Finlay for life, and, after his death, to his eldest son. Now that would be quite simple and would give the eldest son the fee as a purchaser. How then are we to construe the devise over—"in default of male issue of the said George and not attaining lawful age"? *Prima facie* that means "in default of any male issue of George attaining twenty-one." That is hardly consistent with the prior devise to the eldest son only in fee. But Mr. Walker says I must read the word "such" into the clause, and then the devise will run—to George Finlay for life, then to his eldest son in fee, and, in default of the eldest son attaining twenty-one, over. Now, let us see what would be the result of such a construction of this devise. If the eldest son attains twenty-one, it is simple enough, he has the absolute fee; but if he dies under twenty-one, leaving a son and also brothers, the estate would go over upon his death, cutting out both the son and the brothers, even though the son and the

(1) [1900] 1 I. R. at p. 394.

brothers attained twenty-one. That is a result which one cannot reasonably suppose the testator intended, and is, I think, directly opposed to the intention plainly expressed in the devise over, viz.: that the estate should only go over in the event of all the male issue of George dying under twenty-one. To avoid such a result, and the cases I have referred to not, in my opinion, ruling this case, I must see whether I cannot give to the words "lawful eldest male issue" such a construction as will carry out and be consistent with the general intention shown by the subsequent clause.

In his judgment in *Sheridan* v. *O'Reilly* (1) the Master of the Rolls refers to the case of *Doe* v. *Garrod* (2), thus (3):—"The will provided 'as to my worldly estate I dispose thereof as follows: Item, I give to my nephew, Thomas Garrod, all my lands, &c., to have and to hold during his natural life, and to his son, if he has one, if not, to the eldest son of my nephew James Garrod, during his natural life, and to his son, after him, if he has one, if not, to the regular male heir of the Garrod's family, as long as there is one of them in being, and if they should be all extinct, then to the regular heir of my nephew Thomas Field's family.' Testator then made a codicil stating that he had received a letter informing him that the wife of Thomas Garrod had been safely delivered of a son, and that being so, he gave and bequeathed to this son, after his father's death, 'all my houses, lands, &c., and to his eldest son, if he has one; but if he has no son, then to the next regular male heir of the Garrod's family, as long as there is one of them in being.' It was held that the word son must receive a wide construction, and that, having regard to the other phrases in the will, it must include all male descendants; in other words, it must be, from the context, a word of limitation: and, being a word of limitation, it did not lose that character from the use of the word eldest. . . . Lord Tenterden, after pointing out the result of the other construction, says that the decision in favour of an estate tail affords 'the greatest chance of effecting the general intent of the

(1) [1900] 1 I. R. 386.
(2) 2 B. & Ad. 87.
(3) [1900] 1 I. R. at p. 392.

Wylie, J. 1913. *In re* FINLAY'S ESTATE.

testator.'" It seems to me that every word of that applies to this case, and with greater force, because we have here not "eldest son," but "eldest male issue"—words which, without "eldest," are, *prima facie*, words of limitation, and there is here no express limitation to the father for life.

In *Lewis* v. *Puxley* (1) a testator gave his real estate to his eldest son, John, for his life, and to his eldest legitimate son after his death, and, in default of such issue, he gave it in like manner to his son, Richard, and, in case that he had no legitimate issue male, he then gave it in like manner to the offspring about to be born from his dearest wife, Bessy; and, in default of such issue, to his own right heirs. It was held that John took an estate in tail male, the words "eldest legitimate son" being *nomen collectivum*. It was suggested in argument that the Court must insert "such" before "legitimate male issue"; but Platt, B., said:—"We ought not to introduce any words into the will."

In *Doe* d. *Tremewen* v. *Permewen* (2) a testator devised lands to his sister for life, and, after her decease, then to her son, James, and his heir male living to attain the age of twenty-one years; and, in case of no such heir male lawfully begotten, then the inheritance for want of such male issue as aforesaid to redound to his male heir. Lord Denman, C.J., in giving judgment, says (3):—"These words, taken all together, and construed with reference to intention, according to the rules established by numerous decisions, seem to us to import clearly an intention in the testator to give James some interest beyond that of an estate for life. There is a devise to him and his heir of a certain description, and 'the inheritance' is not to go over unless in default of such heir. With this guide to the general intention it is the duty of the Court to effectuate it, if the words be sufficient, and the intention be such as the law permits."

It seems to me, therefore, having regard to these authorities, that, the testator having by the last clause of this devise clearly shown a general intention that the estate should not go over unless there was a default of male issue of George, I am at liberty, in order to effectuate that intention, to construe the words "lawful

(1) 16 M. & W. 733. (2) 11 A. & E. 431. (3) *Ibid.*, at p. 436.

eldest male issue" not as a *descriptio personæ*, but as *nomen collectivum*, embracing the whole line of male descendants, the word "eldest" merely indicating the order of succession. If I am right in so construing the devise, then it is clear from the judgments in *Van Grutten* v. *Foxwell* (1) that the rule in *Shelley's Case* (2) must be applied, and an estate tail given to George Finlay.

So far, in endeavouring to ascertain the intention of the testator, I have only referred to the words of the devise itself, taken altogether, but I think the view which I have so expressed is confirmed by the fact that in other parts of the will, where testator gives an estate in fee, he does so in express and proper technical words, and where he gives an estate for life, he does so in express terms. And in many places throughout the will, where he means "eldest son," he says so; and, in a subsequent part of the will, he refers both to his son, Francis, to whom he had given estates in fee, and his said grandson, George, as *inheritors* of their respective properties, and requires them, in certain events, to make to each other fair compensation according to the proportions of their *inheritances*.

I, therefore, declare that George Finlay took an estate in tail male under this devise (3).

Solicitors for the vendor: *S. & R. C. Walker & Son.*
Solicitors for Helen Finlay: *Weldon Molony.*

J. E. W.

(1) [1897] A. C. 658. (2) 1 Rep. 101.

(3) [NOTE.—Notice of appeal from this decision was lodged on behalf of the vendor, but a compromise was subsequently entered into, and the notice of appeal withdrawn, the necessary permission having been obtained in the lunacy matter.—REP.]

M. R.
1912.
Nov. 7, 8.
1913.
Jan. 15

MACMAHON *v.* MACMAHON.

Contract—Public policy—Husband and wife—Separation deed—Agreement for future separation.

As it is the policy of the law to strengthen and maintain the marriage tie, so too it is its policy when a severance has been made to reunite the parties.

A contract between a husband and wife, who are at the time cohabiting, for future separation, is clearly void as being against public policy.

But when a husband and wife living apart are desirous of effecting a reconciliation, it is not against the policy of the law to make the resumption of cohabitation subject to terms for the future separate maintenance of the wife, in the event of the reconciliation failing to be a permanent one. *Rodney* v. *Chambers* (2 East, 283) commented on.

Application by way of originating summons on behalf of Annie Ryan MacMahon—(1) That an account might be taken of what was due in respect of an annuity charged by a deed of charge of the 17th day of May, 1901 (the terms of which are set forth below), upon the lands therein mentioned; (2) that the amount found due on the said account be declared well charged on the interest of the defendant, E. J. Ryan MacMahon, in the said lands; that payment of the said amount be enforced by sale of the lands or by a receiver or both as the Court may direct.

The deed of charge was in the following terms:—

"This indenture, made the 17th day of May, 1901, between E. J. R. MacMahon of Elkstone House, Cheltenham, in the county of Gloucester, in England, of the first part, Annie Ryan MacMahon, of Elkstone House aforesaid, of the second part, and John Manners, of Beach House, Cheltenham, hereinafter called the trustee, of the third part. Whereas unhappy differences have arisen between the said E. J. R. MacMahon and Annie Ryan MacMahon, and they are now living separately from each other, but are desirous of living together again, nevertheless, with provision to meet the case of any future separation

that may arise between them: and, in order to effect such immediate reconciliation as aforesaid, it has been found necessary by them to enter into these presents, and it has been agreed between them that this deed shall not come into operation until such reconciliation as aforesaid has taken place. Now this indenture witnesseth that in pursuance of the said agreement, and in consideration of the premises and of the covenants hereinafter contained on the part of the said Annie Ryan MacMahon, the said E. J. R. MacMahon hereby covenants with the said Annie Ryan MacMahon, and also by way of separate covenant with the trustee, that the said Annie Ryan MacMahon shall and may at all times hereafter, notwithstanding her coverture (after she shall have given written notice to her husband of such desire), live separate and apart from the said E. J. R. MacMahon as if she were a *feme sole*, and shall thenceforth be free from the control and authority of the said E. J. R. MacMahon, and shall reside in such place or places, and in such manner, as she shall think fit; and the said E. J. R. MacMahon will not at any time thereafter require her to live with him or institute any legal proceedings, or take any other steps whatever for that purpose, and will not in any way molest or interfere with the said Annie Ryan MacMahon, her manner of living or otherwise.

"2. That the said E. J. R. MacMahon will pay to the said trustee the yearly sum of £200 reducible as hereafter mentioned in trust for the said Annie Ryan MacMahon, for her sole and separate use without power of anticipation, during the joint lives of the said E. J. R. MacMahon and Annie Ryan MacMahon, if they shall so long live separate from each other, and the said Annie Ryan MacMahon shall duly observe and keep the covenants on her part herein contained, and continue to live a chaste and temperate life, by equal half-yearly payments to accrue due on the 31st day of December and the 30th June in each year, but not to become payable until the expiration of one calendar month after each of such dates . . . and the said E. J. R. MacMahon hereby charges the payments of the said yearly sum [illegible] such other sums as shall for the time being be payable hereunder upon [the properties therein set forth], and appoints and assigns the said yearly sum, or such other sum as aforesaid, to the said Annie Ryan MacMahon,

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and directs the trustees of [an indenture of settlement therein referred to] to pay the same to the trustee of this indenture upon her behalf accordingly."

The indenture further contained provisos reducing the annuity in case of the reduction of the rent of the said lands and providing for the distribution of Annie Ryan MacMahon's property on her death. It also contained an indemnity to E. J. R. MacMahon against Annie R. MacMahon's debts, or debts incurred on behalf of the children of the marriage. The deed went on—

"5. And further, that the said Annie R. MacMahon, or any person on her behalf, shall not nor will at any time hereafter during the continuance of the said separation and observance of the covenants and obligation herein contained on the part of the said E. J. R. MacMahon commence or prosecute any action or other proceedings for compelling the said E. J. R. MacMahon to cohabit with her, the said Annie R. MacMahon, or allow her any support, maintenance, or alimony (except the said annual sum hereinbefore covenanted to be paid to her), and shall not nor will molest the said E. J. R. MacMahon in any manner.

"6. And it is hereby agreed by and between the parties mentioned that the said Annie R. MacMahon shall have the custody of all the children of the said marriage during such separation, and she shall out of the said annuity of £200 or such other sum as shall for the time being be payable hereunder, maintain, clothe, educate, and support them until such age (not exceeding the age of twenty-one years) as they respectively can or should support and maintain themselves respectively, or being a daughter or daughters shall be married under that age.

"That the said E. J. R. MacMahon shall, at all convenient and reasonable times, but not oftener, in the case of the four daughters, Ethel, Irene, Nora, and Kathleen, of the said marriage, than once in every three months, have access to and communicate with all the said children of the said marriage; that the son Edmond and daughter Frances of the said marriage shall, if the said E. J. R. MacMahon shall so require, whilst they respectively shall be at school, pass not exceeding one half of their holidays with the said E. J. R. MacMahon, provided always the said E. J. R. MacMahon

shall have a proper and suitable home in which the said children can be properly received and taken care of to the satisfaction of the trustee." The deed further contained a provision for reducing the annuity on each child attaining age.

This deed had been executed on the occasion of a reconciliation between husband and wife, and they had thereupon again cohabited, but further differences having arisen, the wife had again left the husband without giving him the written notice provided by the deed. She had, however, on several occasions given him verbal notice of her intention to leave him. She now sought to enforce the provisions of the deed, but it was contended on behalf of the husband that the deed was void as being against public policy.

Ronan, K.C., and *J. C. Meredith*, for Annie Ryan MacMahon :—

Husband and wife may separate under what terms they wish. They cannot arrange for separation at a future time. They may agree to come together with the right to separate subsequently. Public policy changes with changed conditions. *Obiter dicta* to be found in cases at a time when the law in respect of married women was correctly stated by Blackstone, at p. 444, can be of little assistance in determining what public policy is now. The best evidence of public policy is to be found by looking to the statute law. The Married Women's Property Acts are an eloquent testimony to the change of public policy in modern times. They sweep away the policy of leaving a woman with no resources during marriage. But in no possible view can the deed under consideration be held to be void as against public policy, for the parties were living apart at the time the deed was executed, and if it had been confined to providing for the separation it would admittedly have been good. The contention must be that it is void, because the coming into effect of the provisions for the separation are postponed in order to encourage the parties to make another effort to live together. The tendency of the deed is to further the policy of the law. The observations of Lord Cottenham in *Vandergucht* v. *De Blaquiere* (1)

(1) 5 M. & C. 229, at p. 244.

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apply with full force to the present case. "The agreement providing for the event of a future separation was not entered into when the parties were living together, but was the price and condition of terminating a state of separation."

The Solicitor-General (*Molony*, *K.C.*) and *P. White*, for the defendant, E. J. R. MacMahon:—

The most that any case goes to is that the parties coming together can set up a domestic forum, *e.g.*, a trustee. Our law will not recognize an agreement to separate in the future without cause. It might be different if the agreement were to separate for just cause. *Rodney* v. *Chambers* (1) is no longer law. In a case of *H.* v. *W.* (2), Page-Wood, V.-C., lays down the law. Nothing can be permitted which contemplates a future separation of husband and wife where no just cause is given. No doubt the policy of the law may change as is laid down in *Evanturel* v. *Evanturel* (3), but the policy of the law has never changed in seeking to prevent the separation of husband and wife. In Key and Elphinstone, 1909 ed., vol. ii, at p. 502, it is stated that a deed providing for reconciliation and future separation is void. *Rodney* v. *Chambers* (1) was a case in which a domestic forum was instituted. It was not overruled by *Durant* v. *Titley* (4), which case is in our favour to a certain extent. In *Vanderyucht* v. *De Blacquiere* (5) there are only the *dicta* of Lord Cottenham. In that case the wife could only separate for a particular cause, and not as here.

J. C. Meredith, in reply:—

The question as to whether the provisions for the so-called future separation in such a deed as this are to take effect with or without the consent of trustees, as a sort of domestic forum, can only be important as affecting the tendency of the deed as a whole. It was competent to the parties to prefer a written and deliberate notice by the wife to the intervention of third

(1) 2 East, 283.
(2) 3 K. & J. 382 at p. 386.
(3) L. R. 6 P. C. 1, at p. 29.
(4) 7 Price, 577.
(5) 5 M. & C. 229, at p. 244.

parties as so many additional mothers-in-law. The argument that a separation deed, otherwise good, becomes bad if a provision for reconciliation is inserted, could only be sustained if a reconciliation must always be absolute and never on terms, and that, therefore, it must avoid the provisions for separation, even against the intention of the deed itself. This is not the law: *Randle* v. *Gould* (1); *Nicol* v. *Nicol* (2).

[The following authorities were also referred to in the course of the argument:—*Westmeath* v. *Westmeath* (3); *Westmeath* v. *Salisbury* (4); *Hoare* v. *Hoare* (5); *Lord Vane's Case* (6); *Cahill* v. *Cahill* (7); *Weldon* v. *Weldon* (8); *Cartwright* v. *Cartwright* (9).]

1913.
Jan. 15.

THE MASTER OF THE ROLLS:—

The originating summons in this matter was issued for the purpose of determining the liability of the defendant, Edmond John Ryan MacMahon, to pay an annuity to his wife, the plaintiff, Annie Ryan MacMahon, who is living apart from him, for her separate maintenance.

The parties mentioned were married on the 2nd February, 1884, and cohabited for several years as husband and wife. There are six children issue of the marriage, all of whom have attained the age of twenty-one years except two.

In the year 1900, unhappy differences arose between the husband and wife, which resulted in a separation, and they continued to live apart until a reunion was effected under the circumstances I next mention.

Early in 1901, negotiations for a reconciliation took place, and they resulted in the execution of an indenture dated the 7th May, 1901, made between the husband of the first part, the wife of the second part, and the plaintiff John Edward Manners of the third part.

(1) 8 E. & B. 457.
(2) 31 Ch. D., p. 524.
(3) Jacob, 126, at p. 137.
(4) 5 Bligh (N.S.), 339, at p. 366.
(5) 2 Ridgeway, 268.
(6) 13 East, 171.
(7) 8 App. Cas. 420.
(8) 10 Prob. Div. 72.
(9) 3 De G. M. & G. 982.

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This indenture has been called a deed of separation, but, I think, improperly. Let me see what the provisions of the deed are, and the circumstances under which it was executed, without applying a misnomer which may lead to confusion of thought.

The deed commenced by reciting that unhappy differences had arisen between the husband and wife, and that they were then living separately from each other, but were desirous of living together again, nevertheless with provisions to meet the case of any future separation that might occur between them; and in order to effect such immediate reconciliation as aforesaid, it had been found necessary to enter into the deed, and it was agreed that it should not come into operation until the reconciliation had taken place.

The husband then covenanted with the wife, and as a separate covenant with John Edward Manners, as trustee, that the wife should and might at all times thereafter, notwithstanding her coverture (after she should have given written notice to her husband of such her desire), live separate and apart from him as if she were a *feme sole*, and should thenceforth be free from the control and authority of the husband.

The husband further covenanted to pay to the trustee the yearly sum of £200 (reducible as thereinafter mentioned), in trust for the wife for her sole and separate use, without power of anticipation, during the joint lives of the husband and wife, if they should so long live separate from each other and the wife should duly observe and keep the covenants on her part therein contained, and continue to lead a chaste and temperate life, by equal half-yearly payments on the 30th June and 31st December in each year, and the husband charged the annuity on certain lands comprised in an indenture of the 14th March, 1881.

The deed contained a covenant by the wife to indemnify the husband from her debts during the continuance of any such separation as should take place, and not to commence or prosecute any action or other proceeding for the purpose of compelling the husband to cohabit with her, or to allow her any support, maintenance, or alimony except the said annuity, and not to molest him in any way.

The deed contained other provisions not necessary to mention.

Shortly after the execution of the deed a reconciliation took place, and the husband and wife resumed cohabitation. They lived together until the 22nd June, 1911, when, in consequence of differences which again arose, the wife left her husband, and has since lived apart from him.

The husband avers, in an affidavit sworn by him, that the wife did not give him any notice in writing as provided by the deed. The wife in an answering affidavit admits that no notice in writing was given by her prior to her leaving her husband's residence, but she gave him verbal notice on several occasions of her intention to leave him, and informed him in the most definite terms that she could not continue to reside under the same roof with him, owing to his violence caused by excessive intemperate habits. She further avers that her trustee, John Edward Manners, had interviews with her husband and warned him that she would be obliged to leave, and intended doing so. The wife, however, did on the 3rd November, 1911, having previously left her husband's residence, write to him saying, "You know that I am only doing your frequently expressed wish of living apart from you, and I do not intend to go back. I hope when our unfortunate business is arranged you will not be troubled again in any way by me."

They have since continued to live apart, and the question for decision is—whether the husband is liable for the annuity, and from what date?

The husband disputes liability on the ground that the deed made provision for a future separation, and is consequently void, being against the policy of the law.

Now, I am clearly of opinion that if husband and wife who are at the time cohabiting enter into an agreement providing for a future separation, such an agreement is void, although an agreement providing for an immediate separation which immediately takes place is valid. *Rodney* v. *Chambers* (1) no doubt decides that no such distinction is to be made, Lord Ellenborough and the other Judges of the King's Bench,

(1) 2 East, 283.

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who sat with him, holding that as the law recognized the validity of separation deeds under one set of circumstances which must have the effect of weakening the marriage tie, a deed providing for future separation cannot be held to be invalid as against the policy of the law. They thought that once separation deeds were countenanced by the law, all separation deeds, whether providing for immediate or future separation, must be valid. But *Rodney* v. *Chambers* (1) is contrary to the whole current of subsequent authority both in England and Ireland, and I need only refer to the several decisions mentioned in the note S., which is to be found on pp. 439, 440 of the 16th vol. of Lord Halsbury's Laws of England, making special reference to *Westmeath* v. *Salisbury* (2), and *Byrne* v. *Carew* (3).

In my opinion, notwithstanding what was said during the argument, the learned editor of the work referred to had ample authority for the statement in the note referred to, that *Rodney* v. *Chambers* (1) is "no longer law," and I think further that the judgments in that case were never accepted as laying down law which would govern any other case. But the authority of *Rodney* v. *Chambers* (1) is not required to support the deed in question. The essential feature of the present case is, that the husband and wife, parties to the deed, were, and had been for some time previously, living apart, and that the object of the deed was to effect a re-union. So far from offending against the policy of the law, its design was to carry it out. As it is the policy of the law to strengthen and maintain the marriage tie, so too it is its policy when a severance has unhappily been made to re-unite the parties and mend the breach by which the home of the family has been destroyed. I do not think that it can, with any reason, be said that, when husband and wife are living apart, and they are desirous of affecting a reconciliation, it is against the policy of the law to make the resumption of cohabitation subject to terms for the future separate maintenance of the wife in the event of the reconciliation failing to be a permanent one. In some cases it may be absolutely necessary to provide such terms.

(1) 2 East, 283.
(2) 5 Bligh (N S.) 339.
(3) 13 Ir. Eq. R. 1.

I will give an example. A wife may have been obliged to leave her husband because her life was in danger owing to his violent conduct caused by intemperance. The wife, when living apart, may have got employment or set up some business which has afforded her a means of livelihood. Her husband, having reformed, asks her to return, and she, recognizing her wifely duties, is anxious to return, but she is concerned about her future maintenance, because she must give up her employment or her business, and there is the danger ahead of her being obliged for a second time to flee her husband's house. Under such circumstances I cannot see anything against good policy in allowing the wife to impose terms for her maintenance in the event of a future separation. So far from hindering, they promote reconciliation. They make possible and prudent what in many cases would be impossible and highly imprudent.

After these general observations I approach the deed I have to deal with in the present case. It is not properly called a separation deed. It is not a deed whose design is to separate the husband and wife. Its design is to bring them together and reconcile them; but, while this is so, it also makes provision for the wife in the event of the reconciliation ultimately failing. There is here nothing against the policy of the law, and I do not know of any decision to the contrary. Indeed the reported cases are strongly in support of the deed. Lord Eldon's judgment in *Westmeath* v. *Salisbury* (1) is based on the fact that at the time the deed in that case was executed, the parties were living together. He says at page 366 of the report:—"It is an agreed fact that when that instrument was executed there was no separation, indeed there could be no separation consistently with that deed, because it looks forward to the idea of a future separation and excludes the idea of a present separation." In *Vandergucht* v. *De Blacquiere* (2), husband and wife, who were separated at the time, entered into an agreement in writing providing for their living together again, and stipulating that in the event of a future separation the wife should receive the income of certain funds. The validity of the deed was not challenged

(1) 5 Bligh (N.S.) 339, at p. 366. (2) 5 M. & C. 229.

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in that case, but Lord Cottenham seems to have been of opinion that the agreement was valid because "it was not entered into when the parties were living together, but was the price and condition of terminating a state of separation" (p. 2). But I think that there is a direct authority in favour of the deed in the present case. In *Harrison* v. *Harrison* (1) the husband had been convicted of an assault upon his wife, and the Justices made an order under the Summary Jurisdiction (Married Women) Act, 1895, that she was no longer bound to cohabit with him, and ordered him to pay her a weekly sum for the maintenance of herself and her child. The wife then commenced to live apart from the husband, but he entreated her to return to him, which she agreed to do on the terms of a deed which provided *inter alia* that if the husband should be convicted of an assault, or be adjudged to have threatened his wife, or if the Justices should make an order of separation between the parties on any ground whatever, the husband should thereupon pay to the wife £150, which was to be in lieu of any weekly sum ordered by the Justices to be paid. The wife did return to the husband. He again assaulted her. She summoned him. He was convicted, and the Justices made a separation order, giving her a weekly allowance, to be paid by the husband. The wife refused the weekly sum, and brought the action to recover the £150. The defence raised was that the deed was void, as being against the policy of the law, but the deed was upheld by Walton, J., who said—"Here the parties were living apart at the time the agreement was made, and its object was mainly to enable them to live together again, though it also provided for the maintenance of the wife in the event of their subsequently being again separated by the order of the Justices." Walton, J., plainly recognized that a deed executed for the purpose of effecting a reconciliation between husband and wife, who at the time were living apart, may provide maintenance for a wife in the event of a further separation.

For the above reasons, I hold that the deed in question is a valid deed, and that the annuity is well charged.

(1) [1910] 1 K.B. 35.

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The special point has been made that the annuity has not yet become payable because a notice in writing was not served on the husband in pursuance of the deed.

I do not think that there was any such notice previous to the actual separation, but I think that the letter of the 3rd November, 1911, from the wife to the husband was a sufficient notice in writing to make the annuity become payable. I, therefore, hold that the annuity is payable as from that date, and that an apportioned part of one half-yearly gale became payable on the 31st December, 1911, a further half-yearly gale on the 30th June, 1912, another on the 31st December, 1912, and that in the future it will be payable on every 30th June and 31st December.

I also declare the plaintiff entitled to the costs of the proceedings to be raised out of the lands in the same priority as the annuity.

Solicitors for Mrs. MacMahon: *T. F. O'Connell & Son.*
Solicitors for E. J. R. MacMahon: *John L. Scallan & Co.*

A. E. C.

IN THE MATTER OF THE ESTATE OF THOMAS BROWNE.

Ross, J.
1912.
Nov. 18, 25.
Dec. 2.

Vendor and purchaser—Contract for the sale of settled land—Specific performance—Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *s.* 45—*Landed Estates Court Act*, 1858 (21 & 22 *Vict. c.* 72), *ss.* 46, 47, 48.

Section 46 of the Landed Estates Court Act, 1858, enables a limited owner to have his title investigated and a conveyance made by the Court, but does not confer on the Court jurisdiction to enforce specific performance of a contract for the sale of settled land. Sections 47 and 48 deal with the case of an absolute owner of land, and have no application to that of a limited owner

MOTION ON NOTICE.

The petition in the matter was filed on the 2nd September, 1880, in the matter of the petitioner's settled estate and in the matter of the Settled Estates Act, 1877, praying that an agreement entered into by the petitioner and the Earl of Milltown for

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In re Browne's Estate.

the sale of the lands of Ballydallagh, county Kildare, should be carried into effect. An order was made on the 4th November, 1881, directing that the agreement should be carried into effect, and that a statutable conveyance of the lands should be made to Lord Milltown, as soon as the title had been approved of and the final schedule of incumbrances settled; and it was further ordered that an application should be made, upon the settling of the final schedule, for an order declaring the purchaser of the lands at the sum of £2000.

The present application was brought by the owners and petitioners for an order that the Countess of Milltown, as personal representative of the Earl of Milltown deceased, should be declared the purchaser of the lands for the sum of £2000.

The facts appear in the judgment of Ross, J.

A. W. Samuels, K.C., and *Poole*, for the petitioners having carriage.

J. B. Falconer, K.C., and *H. Wilson, K.C.*, for the Countess of Milltown.

[The following cases were referred to:—*Curtis* v. *Sheffield* (1); *In re Barrs-Haden's Settled Estates* (2); *Higgins* v. *Shaw* (3); *Moore* v. *Blake* (4); *Levy* v. *Stogdon* (5); *In re Fenton* (6); *Maconchy* v. *Clayton* (7).]

Dec. 2.

Ross, J.:—

The late Thomas Browne was, under his marriage settlement, entitled as tenant for life to the lands of Ballydallagh, county Kildare, held with others under a grant in fee from the Commissioners of Church Temporalities. The lands, comprising about 41 acres, adjoin the Milltown demesne. The late Earl was desirous of purchasing them, and including them within the boundaries of the demesne. An agreement was executed by Mr. Browne and Lord Milltown on the 3rd March, 1879. The

(1) 20 Ch. D. 398.
(2) 32 W. R. 194.
(3) 2 Dr. & W. 356.
(4) 1 Ball & B. 62.
(5) [1899] 1 Ch. 5.
(6) 7 Ir. Jur. (N. S.) 161.
(7) [1898] 1 I. R. 291.

price was to be £2000. The lands were purchased subject to existing tenancies. Thomas Browne was to present a petition to the Land Judges to have the sale carried out. The purchaser was to contribute £40 towards the costs of the petition; the rest of the costs were to be borne by the vendor. The purchaser was to get possession when the contemplated conveyance was executed by the Judge. In case the Judge should refuse to approve of and carry out the sale, the agreement was to be held void.

A petition was filed on the 2nd of September, 1880, by the vendor in the matter of this settled estate, and in the matter of the Settled Estates Act, 1877, praying that the agreement should be approved by the Court, and directed to be carried into effect. An order was made on the 4th November, 1881, directing the agreement to be carried into effect, and that a statutable conveyance should be made to Lord Milltown, on the terms and conditions in the agreement mentioned, so soon as the title was approved of. No further steps seem to have been taken. Lord Milltown died on the 30th May, 1890. At the time of the sale there had been two tenants paying two rents amounting to £36 0*s.* 10*d.* These tenancies Lord Milltown bought up for £500. From that time these rents have been paid to the Browne estate by Lord Milltown till his death and by Lady Milltown since. Lord Milltown proceeded to enclose the land in his demesne. He extended the demesne wall round both holdings. He straightened the boundary, exchanging lands with adjoining owners. He pulled down one of the tenant's houses and planted ten acres with ornamental timber. Of late a notice to quit was served on Lady Milltown with the object of terminating a supposed tenancy from year to year. A notice under the Act of 1870 was served on behalf of Lady Milltown, claiming for improvements, which came on before, and was actually adjudicated on by, the County Court Judge. As the notice to quit was served when the facts were insufficiently known by the solicitor who served it, these proceedings do not really affect the question before me. I am now asked under the Landed Estates Court Act to enforce specific performance of the agreement.

The first question that arises is in reference to jurisdiction. Has this Court power now to enforce specific performance of the

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contract? Is this a petition under the provisions of section 46 of the Landed Estates Court Act, or under section 47?

Here it becomes necessary to consider the policy of the settled land legislation. It was long felt that the system of settlement that prevailed in England and Ireland not only caused grave inconvenience to the persons interested in the settlement, but was attended with serious public disadvantage. Trustees and beneficiaries were obliged, at great expense, to procure private Acts of Parliament, and the public were deprived of the opportunity of freely purchasing land and easements. The first Act that enabled the limited owner to sell the inheritance was the Settled Land Act of 1856. Then followed the Acts of 1858, 1864, 1874, 1876, then the codifying Act of 1877, and finally the Act of 1882, mainly the work of Lord Cairns. The Act referred to in the 46th section of the Landed Estates Court Act is the Settled Estate Act of 1856. The person referred to in the 46th section is a limited owner who, under the Act of 1856, was obliged to make the application for the sale of a settled estate. Such a person is authorized to apply to the Landed Estates Court instead of the Court of Chancery. The Judge himself is to execute the conveyance, and to confer indefeasible title on the purchaser. This section is transferred *mutatis mutandis* into the Settled Estates Act of 1877. There is no allusion in this section to any method for enforcing specific performance of the contract. It simply enables the limited owner to have his title investigated by this Court, and to have a conveyance made by the Judge. It does not contemplate or provide for a case of resistance on the part of the purchaser.

Sections 47 and 48 deal with a different class of petitioners. There is no allusion in these sections to settled land at all. They are not re-enacted or alluded to in any of the later Settled Land Acts; they simply provide for a contract of sale. They enable vendor and vendee to petition the Court for the purpose of procuring for the vendee an indefeasible title, and as incidental to this the Court may make an order for specific performance of the contract. These sections do not contemplate a limited owner at all. They deal with the case of an absolute owner. As I have

not an absolute owner before me, I have no jurisdiction under these sections to make any order for specific performance.

This disposes of the whole matter, but I think it right to state my opinion on the other subjects of contention. It is of the essence of the contract that title should be made within a reasonable time. It has taken more than thirty years to make a good title. No Court of Equity ever enforced a title after such extreme delay. Again, when the solicitor for the vendor admitted his inability to make a good title in 1886, he actually asks for another offer on a different basis. Another offer is accordingly made by Lord Milltown, but nothing comes of it. This, I think, amounts to an abandonment of the original agreement. It is said there was no power in the tenant for life to abandon the contract after the order of 1881. But the contract involved making title to the satisfaction of the Land Judge. When this could not be done, what was to prevent the tenant for life from rescinding or abandoning the contract? How could the remainderman keep it alive when it had perished through its own inherent weakness? On all these grounds I am of opinion that the present application cannot be sustained.

Solicitor for the owners and petitioners: *C. H. Denroche.*
Solicitor for the Countess of Milltown: *W. A. Lanphier.*

D. M. S.

M. R.
1912.
Nov. 20.
1913.
Jan. 23.

STANLEY *v.* BOND.

(1912. No. 485.)

Will—Construction—Survivorship—Gift over—"Other and others."

Under a gift, in the event of a daughter dying without being married, to the other and others of the testator's daughters by name in equal shares, the words "other and others" will not be read as "survivor and survivors," unless the context requires it.

A testator, having three unmarried daughters, C., J., and L., and one married daughter E. G., directed his trustees to divide the net proceeds of his property between his daughters C., J., and L., in equal shares, their shares to become vested and payable on marriage, the yearly interest to be paid to each in the meantime, and if any of them, the said C., J., and L., should die without being married, then, as well the original share thereby given to her so dying, as any other share which she should have taken by survivorship or accruer, should go and belong to the other and others of them and also to the said E. G., in equal shares.

C. married, J. and L. never married. C., E. G., and J. predeceased L.

On the death of L., the question arose, Who was entitled to the fund which represented the shares of J. and L.?

Held, that the words, "other and others" should not be read as equivalent to "survivor and survivors," but were to be read in their ordinary meaning, and that the fund was divisible between the representatives of C. and E. G., equally.

ADJOURNED SUMMONS.

This was a summons taken out by William Burroughs Stanley and Charles Knox Bond, the trustees of the will of James Wensley Bond, for the determination of certain questions which arose on the death of the testator's surviving daughter, Louisa Bond.

The following statement of the facts is taken from the judgment of the Master of the Rolls.

James Wensley Bond by his will, dated 25th June, 1842, devised and bequeathed certain real and personal estate upon trust for sale and conversion, and directed his trustees after payment of his debts to pay and divide the net proceeds

between Catherine Bond, Jane Bond, and Louisa Bond, in equal shares, their respective shares to become vested in and payable and transferable to them respectively upon their respective days of marriage and not sooner, but the yearly interest and produce thereof to be paid unto each of them respectively in the meantime for their respective use and benefit, and if any of them the said Catherine Bond, Jane Bond, and Louisa Bond, should die without being married, then as well the original share thereby given to her so dying, as any other share which she should have taken by way of survivorship or accruer, should go and belong to the other and others of them and also to Elizabeth Gosselin, the wife of Thomas Gosselin, in equal shares.

The testator further directed that upon the marriage of each or any of them the said Catherine Bond, Jane Bond, and Louisa Bond, the share or portion to which she should be then entitled, whether in her own right or by survivorship or accruer, should be settled and vested in trustees for her separate use.

The testator further directed that in case the proceeds of the sale of the said lands and the conversion of the personal estate should not be sufficient after payment of his debts to produce the sum of £3000 for each of them, the said Catherine Bond, Jane Bond, and Louisa Bond, the deficiency should be charged upon certain other lands in the will mentioned.

The testator died on the 8th February, 1843, and the will, with one codicil which does not affect the case, was proved on the 4th March, 1843. The lands devised upon trust for sale as mentioned above, and the personal estate, proved insufficient for the payment of the testator's debts, and accordingly the legacies became a charge on the other lands referred to.

Catherine Bond, Jane Bond, Louisa Bond, and Elizabeth Gosselin were illegitimate daughters of the testator. Catherine Bond married Samuel Wensley Blackall; she died in the year 1864, in her husband's lifetime. Elizabeth Gosselin survived her husband, and died intestate on the 23rd April, 1887. Letters of administration of her estate were granted to James Willoughby Bond, as a creditor. Being illegitimate, her estate subject to payment of her debts would go to the Crown. Jane Bond died a spinster

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on the 24th April, 1900, and Louisa Bond died a spinster on the 19th February, 1912.

In addition to the above statement it is only necessary to state that the legacies bequeathed to Jane and Louisa Bond were represented by a sum of £5670 2*s.* 8*d.*, and that the interest of Catherine Bond, otherwise Blackall, vested in her husband, Samuel Wensley Blackall, who died in 1871.

The defendants to the adjourned summons were James Willoughby Bond, one of the next-of-kin of James Wensley Bond, Charles Walter Blackall, the personal representative of Samuel Wensley Blackall, and the Attorney-General for Ireland.

The questions asked by the summons were as follows:—

1. Whether on the true construction of the will, and in the events which happened, Charles Walter Blackall is absolutely entitled, subject, however, to existing incumbrances, to one equal moiety of the said sum of £5670 2*s.* 8*d.*, subject to the trusts of the said will?

2. Whether the Crown is now entitled to the remaining moiety of the said sum of £5670 2*s.* 8*d.*?

3. If not, whether the next-of-kin of the said James Wensley Bond are now entitled to the entire sum of £5670 2*s.* 8*d.*?

E. S. Murphy, for the plaintiffs.

Dromgoole, K.C. (with him *The Solicitor-General* (*Molony, K.C.*) and *H. MacDermot*), for the Attorney-General:—

The words "survivorship or accruer" mean accruer by survivorship, and the words "the other and others" should be read as equivalent to "survivors or survivor." This may be done if the context requires it: *Chaston* v. *Seago* (1). If the words "other and others" are read in their ordinary meaning, no effect is given to the words "survivorship or accruer." The intention was that the daughter who survived should take the shares of the unmarried daughters. Louisa was the survivor, and the Crown, as representing her, should be declared entitled to the whole fund, which represents the shares of Jane and Louisa.

(1) 18 Ch. D. 218.

Herbert Wilson, K.C., and *E. Fitzgerald*, for the defendant, James Willoughby Bond, who was appointed to represent the next-of-kin of James Wensley Bond :—

The words "others or other" occurring in a will cannot, in an ordinary case, be read as equivalent to "survivors or survivor"; but in this will the words "survivorship or accruer" occur, and explain the meaning of the words "the other and others." They occur again in the direction for settlement of a daughter's share on marriage. They point to a daughter taking by survivorship only. The words "survivorship" and "accruer" mean the same thing. The words "other and others" show that a diminishing class was contemplated, and there could only be such a class if one or more of the class died; that shows that "others" should be read "survivors." It is admitted that the legacy to each daughter did not vest until marriage; the intention was to give the legacies of unmarried daughters to the married daughters, but only if they survived the unmarried daughters, which event did not happen. The gift to Mrs. Gosselin depended also on her surviving the other daughters. In the result there was no survivor who could take, and there was therefore an intestacy, and the next-of-kin of the testator are entitled to the whole fund.

Gerald FitzGibbon, K.C., for the defendant, Charles Walter Blackall.

The fund should be divided as suggested in questions 1 and 2, equally between the Crown, as representing Mrs. Gosselin, and Charles Walter Blackall, as personal representative of Samuel Blackall, the husband of Catherine Blackall. The words "other and others" must be given their ordinary meaning. There is no authority for reading "other" as equivalent to "survivor": 2 Jarman on Wills, 6th ed. (1910), p. 2100, note (*a*): "It seems that 'others or other' will not be read as 'survivors or survivor.'" *In re Hagen's Trusts* (1), there cited, is as near to this case as any case on the construction of a will can be. The testatrix there had five children, three sons and two daughters; one daughter was married at the date of the will, the other never married. The

(1) 46 L. J. Ch. 669.

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will provided for the settlement of a fund on each daughter and her children, with a gift over, in default of children, "to the others or other of them" (naming the four other children), "equally to be divided between or amongst them, if more than one." Two of the sons died in the lifetime of the unmarried daughter, the third son and the married daughter survived her. It was argued there that the words "others or other" should be read as equivalent to "survivors or survivor," and that the fund was divisible between the two survivors, but Hall, V.-C., held that the words must have their ordinary meaning, and did not mean the same thing as children surviving at the death of the unmarried daughter, and that the representatives of the two deceased sons were entitled to share in the fund. He pointed out that the contrary construction would exclude the children of a daughter dying in the lifetime of the tenant for life. That applies here. If there were now in existence children of Catherine, they would be excluded by the construction contended for by the defendant, Bond. The words "in equal shares" indicate a division, and not an accumulation of the whole in one person, and the words that follow bear that out. *Chaston* v. *Seago* (1) is a decision in my favour. If the words were "survivors or survivor," it might be fairly argued that they should be read as equivalent to "others or other," as that has been done where the context so requires: Theobald on Wills, 7th ed. (1908), pp. 688–90; 2 Jarman on Wills, 6th ed. (1910), p. 2100, and cases there cited. The expression "survivorship *or* accruer" contemplates the possibility of a taking otherwise than by survivorship, which must be by representation.

1913.

Jan. 23.

THE MASTER OF THE ROLLS, having stated the facts as above, proceeded as follows:—

Under the circumstances the legacies bequeathed to Jane Bond and Louisa Bond did not vest in them, and the question arises—Who is now entitled to the fund which represents them?

It was contended on behalf of the Crown that the gift over in the event of any of them, the said Catherine Bond, Jane Bond,

(1) 18 Ch. D. 218.

and Louisa Bond dying unmarried, to the other and others of them, should be read as a gift over to the survivor or survivors, that "other and others" was used in the sense of "survivor and survivors." If this be the true construction, both legacies (unless there was an intestacy) vested in Louisa, who was the survivor, and the Crown would be entitled to the whole amount. In the event of an intestacy the whole fund would go to the next-of-kin of the testator. On the other hand, if "other and others" is to be read in its *prima facie* and natural meaning, the entire fund went in equal shares to Catherine, who, having married, became entitled to her legacy, both original and accruing as a vested legacy, and to Elizabeth, who took absolutely any share which accrued to her without any gift over. On this construction the Crown would get a moiety of the fund, viz., Elizabeth's share, subject to the payment of her debts.

Unless there is something in the context which shows that a testator did not use the words found in his will in their natural and ordinary meaning the Court is bound to give them that meaning and no other. *Prima facie* "other and others" has no reference to survivorship, and I am unable to find anything in the will which restricts the meaning by importing into it the idea of survivorship. It was contended that the use of the word "other" as well as "others" shows that the testator contemplated a diminishing class, and that the diminution could only be caused by the dropping of lives, which on each occasion would leave a smaller number of survivors in existence. But, construing "other and others" in its *prima facie* sense, the class taking the gift over absolutely would be a diminishing class independently of the character of survivorship, because those who died without having married did not take either an original or accrued share under the will, but only got the interest thereon. In other words, the class who would ultimately take would be diminished, not by death at a particular date, but by death at any time without being married. I do not, therefore, consider that the argument based on the growing diminution of the class is one that ought to prevail. As I have already said, words in a will ought to be read in their natural meaning unless the context imposes some other meaning. I do not find anything in this will which forces me to

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read "other and others" as "survivor and survivors." Indeed, it seems to me that if the words "survivor and survivors" had been used by the testator, a very plausible argument would have been open to read them as "other and others," for we have the words "survivorship or accruer," which suggest that there might be an accruer independently of survivorship. This affords an illustration of the imprudence of substituting words with a different meaning from that of words actually used by a testator, unless it is absolutely necessary to do so to give sense to the will. For these reasons I hold that one moiety of the fund which was enjoyed by Jane and Louisa went on their deaths without being married to the personal representative of Catherine Bond, and the other moiety to the personal representative of Elizabeth Gosselin.

The answer to the first question in the summons will be "Yes."

The answer to the second question will be "Yes, but subject to the payment by the personal representative of Elizabeth Gosselin of her debts, funeral and testamentary expenses."

No answer to the third question is required.

Solicitors for the plaintiffs: *H. & W. Stanley.*
Solicitors for the defendant, J. W. Bond: *Reeves & Sons.*
Solicitors for the defendant, C. W. Blackall: *H. & W. Stanley.*
Solicitors for the Attorney-General: *J. & L. Scallan.*

W. L.

IN THE MATTER OF THE ESTATE OF CRAWFORD S. DONNELLY AND ANOTHER.

Wylie, J.
1912.
Nov. 7, 12.

Appeal.
1913.
Jan. 16, 17.
Feb. 4.

Marriage settlement—Trust funds supplied by intended wife's father described as being "as and for her portion or fortune"—Failure of express trust in actual events—Resulting trust whether in favour of intended wife or of her father—Express provisions in settlement negativing hypothesis of absolute gift to intended wife.

By settlement executed on the marriage of A's daughter, B, with D, A covenanted to execute to the trustees of the settlement two bonds to secure £3000 each, one to bear interest from its date, the other from A's death, both bonds to be payable after his death, "as and for the portion or fortune" of his said daughter. D's father, C, thereby also covenanted to execute to the trustees a bond to secure £5000. The trusts were to pay the interest of the three sums, so secured to D for life, and after his death to B, if then living, for life, in bar of all her claims under A's own marriage settlement. Then followed trusts for the issue of the marriage. Power was given to B, if she pre-deceased her husband without issue, to appoint by will £2000, part of the £3000 secured by A's first-mentioned bond, as she might think fit, in which case the residue of that £3000 was not to be payable, but was to enure for A's benefit. In default of issue, there was an express ultimate limitation of the second sum of £3000 to A, and of the £5000 to C, and D was given a general power of appointing £2000, part of this sum of £5000. B survived A and D for many years. There was no issue of the marriage.

Held, that while *Ward* v. *Dyas* (Ll. & G. *temp.* Sugden, 177) and the cases which have followed it are to be treated as unimpeachable authorities, the rule of construction thereby laid down is subject to be rendered inapplicable by a contrary intention shown by express provisions of the instrument itself, and that there was sufficient in the present settlement to show that the intention of the parties was that the resulting trust of the first-mentioned £3000, in the events which happened, was in favour of A and not of B.

OBJECTION to the final schedule of incumbrances. The facts on which the question arose were as follows:—

By a settlement of 19th October, 1842, on the marriage of the Rev. Thomas Moutray with Eliza Crawford, and to which Andrew Crawford, father of Eliza Crawford, and John Corry

Wylie, J. 1912.

In re Donnelly's Estate.

Moutray, father of Thomas Moutray, were parties, Andrew Crawford agreed to execute to trustees for the uses of the marriage two separate bonds for £6000 each to secure £3000 each, with warrant to confess judgment, both bonds to be payable twelve months after his death, but the first to bear interest at five per cent. from date and the second the same interest from six months after his death, and the two bonds were expressed to be as and for the portion or fortune of his said daughter. It was also agreed that John Corry Moutray and his eldest son, Anketell Moutray, who was not a party to the settlement, should execute to the same trustees a joint and several bond and warrant for £10,000 to secure payment of £5000, with same interest from date, and that said several bonds and the moneys thereby secured should be vested in the said trustees for the purposes of the said marriage, and be applied and disposed of as thereinafter mentioned. Then, after reciting the due execution of the said several bonds, the settlement witnessed that, in consideration of the marriage, and of the principal sums of £3000, and £3000 so secured by Andrew Crawford as and for the marriage-portion or fortune of said Eliza Crawford, and in full of all her rights under said Andrew Crawford's marriage settlement, and also in consideration of the said sum of £5000 secured as aforesaid for making a provision for the said Eliza Crawford and her issue, if any, it was thereby declared that the trustees should hold all the said bonds and the moneys thereby secured upon the trusts thereinafter expressed, viz.: upon trust, after the marriage, to pay the interest to Thomas Moutray, during his life, and, after his death, if Eliza Crawford should be then living, to pay her the interest on said three principal sums during her life, such interest to be in lieu of jointure, dower, or thirds, and also in bar of all claims under her father's marriage settlement. Then there was a testamentary power given to Eliza Crawford, if she should die in the lifetime of her husband without leaving any issue who should attain a vested interest, to appoint £2000, portion of the £3000 secured by the first-mentioned bond, as she might think fit, and it was provided that the residue of said sum of £3000 was not to become payable, but to enure to Andrew Crawford, his executors and administrators. As regards the second £3000, it was provided

that in case of there being no issue to take under the limitations to the issue, that £3000 was, after the deaths of husband and wife, to go to Andrew Crawford, his executors and administrators.

There was no express trust declared of the first £3000 in the event of the wife surviving the husband and leaving no issue, which event had happened. There was, therefore, admittedly a resulting trust of this £3000 to the settlor, and the question was raised, in the case of the first £3000, who was the settlor, whether Andrew Crawford or Eliza Crawford?

The trusts of the £5000 secured by John Corry Moutray were to pay the income to the intended husband and wife successively for life, and then for the issue of the marriage. In default of issue Thomas Moutray was given a general power of appointment over £2000, part thereof; and as to the residue there was an express trust after the deaths of Eliza and Thomas Moutray, without issue, for John Corry Moutray. Judgments were entered on the bonds, and the sums secured thereby became charges on the landed estates of Andrew Crawford, and John Corry Moutray, respectively. The marriage was duly solemnized. Thomas Moutray died in 1844, and Andrew Crawford died on 4th January, 1845. There was no issue of the marriage. Eliza Moutray died on 6th August, 1902. By will dated 10th November, 1896, Eliza Moutray purported to appoint £2000, part of the first-mentioned £3000, to her niece, Edith S. M. Hart, who died in the testatrix's lifetime. She bequeathed the residue of her estate to her nephew, J. T. Moutray, and appointed her nephew, Anketell Moutray, her executor. The said Anketell Moutray, and Mervyn S. T. Moutray, were also executors of Whitney Moutray, the last surviving trusteee of the settlement of the 19th of October, 1842, and they filed the present objection to the final schedule of incumbrances, claiming that there was a resulting trust as to the first £3000 in Eliza Moutray. The owners in this matter, who derived the estate under Andrew Crawford, disputed this claim.

S. L. Brown, K.C., and *Monroe*, for the vendors.

A. B. Babington and *E. S. Murphy* for the objectors.

The arguments were in substance similar to those in the Court of Appeal, reported *post*, p. 182.

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1912.

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Nov. 12.

WYLIE, J.:—

[After stating the facts as above set out, his Lordship continued.] I think there is no doubt as to the law affecting the question that arises here. It has been very fully considered and clearly and accurately stated by Barton J., in the recent case of *Doyle* v. *Crean* (1), following the case of *Ward* v. *Dyas* (2), which was also followed by Sir Edward Sullivan, Master of the Rolls, in *Dennehy* v. *Delany* (3); and all the cases show that what you have to do in order to decide this question is, to ascertain from the settlement whether the money was intended to be settled by the father to the uses of the settlement, or to be an absolute gift to the daughter to be settled by her to the uses of the settlement?

In *Ward* v. *Dyas* (2) the money was described as the "marriage-portion" of the daughter, and in *Dennehy* v. *Delany* (3) as the daughter's "fortune," and in both cases the inference was drawn from the documents that an absolute gift to the daughter was intended. In *Doyle* v. *Crean* (1), there were no words of this description used, but there was on the face of the settlement ample evidence to show that the trust funds were given to the daughter absolutely as her share of the father's estate.

Now in this case counsel for the representatives of the daughter contend that, because these two sums of £3000 each are described as being "as and for the marriage-portion or fortune" of the daughter, and in full of all her rights under her father's marriage settlement, I am bound to infer an intention on the part of the father to make an absolute gift of these two sums to his daughter in order that she might settle the same upon her marriage, even though in a subsequent part of the deed it is the interest on said sums for her life that is stated to be in bar of such rights. But in order to ascertain the intention of the parties, I must look at the whole deed, and see whether it is consistent with such an intention. It will be observed that both sums of £3000 are stated to be for the portion or fortune of the daughter, yet the trust as to one of them, after the life interests of husband and wife, in case of no

(1) [1905] 1 I. R. 252.
(2) Ll. & G. *temp.* Sugden, 177.
(3) I. R. 10 Eq. 377.

issue at their death, is for Andrew Crawford, the father, his executors, and administrators. And the trust of the other £3000 after the said life interests, is, in case the wife dies in the lifetime of the husband, as to £2000 thereof to such persons as the wife might by will appoint, and as to the other £1000, it was not to be paid or raised, and was to enure to Andrew Crawford, his executors and administrators. Are those trusts consistent with an intention on the part of Andrew Crawford to make an absolute gift of both those sums as a marriage-portion to his daughter?

Again, the deed further provides that if Eliza Crawford died in the lifetime of her husband, and exercised her power of appointment over a portion of one of said sums of £3000, no sum so appointed should be paid, nor should the residue of said sum merge in the inheritance during the husband's life, it being the intent and meaning of the parties that the husband should have the interest on the said three sums of £3000, £3000, and £5000 during his life. Now, is it reasonable to suppose that if this £3000 had been given as an absolute gift to the daughter that she, in settling it, would have reserved to herself a power of appointment over £2000 only, leaving the other £1000 to go back to her father? It is clear, I think, from the proviso referred to, that the husband was not to take any part of the capital moneys, but only the interest during his life. Am I, therefore, to impute to the wife anything so unnatural as, that being entitled absolutely to £6000, she should provide by her marriage-settlement that, in the event of her dying without issue in the lifetime of her husband, £4000 of the £6000 was to go to the representatives of her father, and £2000 to somebody else under her appointment, the argument of counsel for her representatives being that this power was taken by her in order to prevent her husband from taking the £2000 in case she died intestate, and not a power given to her to enable her to give to the husband what he would not otherwise get.

I think the provisions in the settlement as to the £5000 provided by the father of the husband throw some light on the intention of the parties as to the £6000. If there were issue of the marriage to take under the settlement, the trusts of the £6000 and £5000 are identical. But if there were no such issue, then the husband is given a power of appointment over £2000 of the

Wylie, J. 1912. *In re* DONNELLY'S ESTATE.

£5000 as he might think fit. If he does not appoint then the £2000 is to go back to his father, his executors, administrators, and assigns, and, in any event, the other £3000 is to go back in the same way; but no sums so appointed are to be payable during the life of the wife, in case she survives her husband, it being the true intent and meaning of the parties that the wife should receive the interest on the £3000, £3000, and £5000 during her life—a provision hardly consistent with her being entitled to the first £3000 absolutely. The only difference between the position of the husband and wife in respect of the trust moneys supplied by their respective fathers, after the death of both without issue, is that the power to appoint £2000 is only given to the wife in case she dies in the husband's lifetime, and there is no trust declared of it in case she did not appoint, or of the whole £3000 in case she survived her husband. If the draughtsman had not overlooked those two contingencies, the deed would have been perfect.

In my opinion, no one reading this entire deed could have any doubt that the two settlors in this settlement were the fathers of the husband and wife respectively; and, therefore, the trust as to the £3000 results to Andrew Crawford, his executors, and administrators.

J. E. W.

Appeal. 1913. Jan. 16, 17.

The objectors appealed (1).

A. B. Babington and *E. S. Murphy* (with them *D. S. Henry, K.C.*), for the appellants :—

No reason is given on the face of the settlement for the different destinations of the two sums of £3000 in the event which occurred of Mrs. Crawford surviving her husband and leaving no issue of the marriage. Whether this is to be attributed to oversight on the part of the draughtsman or to instructions to do so, a resulting trust was unquestionably the consequence, and the question we are concerned with is, In whose favour did that trust result? Was it to Andrew Crawford or his daughter, Mrs. Moutray?

(1) In the Court of Appeal before THE LORD CHANCELLOR and LORDS JUSTICES HOLMES and CHERRY.

Wylie, J., decided on his construction of the whole instrument that Andrew Crawford was to be regarded as the settlor of this money, and that the resulting trust would be in his favour. If on failure of issue Andrew Crawford was to be entitled, what was the use of the special provision that if the wife exercised her power of appointment the residue of the first £3000 was not to be raised? Again, why was there an express ultimate limitation to Andrew Crawford as regards the second £3000 if, in default of issue, he was to be ultimately entitled to both these sums? But both sums are expressly described as being provided by Andrew Crawford as and for "the portion and fortune" of his daughter. The present case is thus directly brought within the canon of construction laid down by Lord St. Leonards in *Ward* v. *Dyas* (1), which has never been questioned or departed from. By using these terms the person who contributes the fund parts with all right to it, invests the intended wife with all property in it for the purposes of the settlement; she becomes the settlor, and so far as any trusts of the settlement may fail or not extend, it is in her favour that a trust results. There is also the presumption of advancement: *Bennet* v. *Bennet* (2); *Rainy* v. *Ellis* (3); *In re Nash's Settlement* (4). The Irish authorities are numerous, consistent, and clear, and show unswerving adhesion to the principle of *Ward* v. *Dyas* (1). In *Dennehy* v. *Delany* (5) Sullivan, M.R., says, at p. 385, speaking of *Ward* v. *Dyas* (1):—"It decides this proposition in which law and common sense run together, viz., that where a father on his daughter's marriage agrees to give his daughter a fortune, that fortune belongs to the daughter and her husband, save to the extent that their rights are controlled by the settlement." And at p. 383, referring to the actual case before him, he says:—"But in a case where a man marries a girl with property, which is advanced for the first time by the father of the girl as her fortune, if there was an actual settlement almost identical with the words of the memorandum, the trust would, I take it, not result to the father of the girl but to the girl herself. When

(1) Ll. & G. *temp.* Sugden, 177.
(2) 10 Ch. D. 474.
(3) W. N. 1872, p. 104; 26 L. T. (N. S.) 602; 27 L. T. (N. S.) 463.
(4) 51 L. J. Ch. (N. S.) 511.
(5) I. R. 10 Eq. 377.

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a father devotes a sum of money to his daughter's fortune on her marriage, he has no right to claim it back in a given event, unless there is an express agreement to that effect." In that case no settlement was executed, but a memorandum of what the father proposed was sent by him to his intended son-in-law. This stated his intention to charge his property with £1000 as her (the daughter's) fortune, she to receive the interest for her life, and if she should have children with power to her and her husband to dispose of it amongst such children. The daughter died childless within a year of the marriage, and her father claimed the fund—a claim which was met by the Court with contemptuous rejection. Every word of the Master of the Rolls' judgment in that case (a Judge in the history of the Irish Bench second only, if not equal, in reputation to Lord St. Leonards) bears with coercive strength on the question which is raised here. The cases are wholly undistinguishable. If possible, *Dennehy* v. *Delany* (1) was more favourable to the father, as being the case, not of an executed settlement as here, but merely of an executory agreement.

More recently the point arose before Barton, J., in *Doyle* v. *Crean* (2). In that case the words "as her fortune" or "as her portion" were not used in connexion with the settled fund. But the learned Judge (p. 258) put as the test, "Was there in the settlement any sufficient indication that this £800" (the fund in question) "was to be a gift to, or a provision for, the daughter?" And, having answered that question in the affirmative, he unhesitatingly followed *Ward* v. *Dyas* (3). A similar question arose with reference to an annuity before Meredith, M.R., in *Sweetman* v. *Butler* (4), where, as in the present case, the event of the wife surviving her husband, which happened, was not expressly provided for by the settlement. In *Champ* v. *Champ* (5) an express ultimate limitation to the settlor was held to be excluded by an implied trust in favour of the issue of the marriage. Reliance will probably be placed by counsel for the owners upon *The Attorney-General* v. *Biggs* (6).

(1) I. R. 10 Eq. 377.
(2) [1905] 1 I. R. 252.
(3) Ll. & G. *temp.* Sugden, 177.
(4) [1908] 1 I. R. 517.
(5) 30 L. R. Ir. 72.
(6) [1907] 2 I. R. 400.

That was a case involving a question of succession duty, which depended on who was the "predecessor" within the Succession Duty Acts, and has no real bearing on the present case. Any disparaging remarks on *Ward* v. *Dyas* (1), such as, *e.g.*, that it is not included in Gamble and Barlow's Digest (2), may therefore be disregarded. The authority of *Ward* v. *Dyas* (1) was not attempted to be impeached by either Mr. Justice Gibson or Mr. Justice Kenny. We contended that it established judicially a canon of construction recognized and followed by an unbroken chain of authority extending over seventy years. True, like every other rule of construction, it may be displaced by a clear intention to the contrary, if shown in the instrument. But such intention is not sufficiently exhibited here by the fragmentary excerpts relied on by the learned Judge in the Court below. Any father can understand the meaning of endowing his daughter with a marriage-portion—of giving her a fortune—while he may be unable to follow or appreciate the vagaries of a draughtsman's inept efforts to carry out what may possibly have been confused and imperfect instructions.

S. L. Brown, K.C., and *Herbert Wilson, K.C.* (with them *Monroe*), for the respondents:—

The question here is, Who was the settlor? Was it Andrew Crawford or his daughter, Eliza? Andrew was *prima facie* the settlor, for the fund was his. It was to be secured as a charge on his estate by means of a judgment on his bond, which was the security commonly given in such cases at the date of this settlement. What is there to show that he gave over the fund and the absolute control of it to his daughter to settle as she pleased, and so as to constitute her the settlor in place of himself? The answer to this must be found within the four corners of the settlement itself. The appellants rely on the words "as and for the portion or fortune of said Eliza Crawford," and, taking these words apart from everything else in the deed, seek to maintain that, on

(1) Ll. & G. *temp.* Sugden, 177.

(2) *Ward* v. *Dyas*, decided 3rd Feb., 1835, would not come within the scope of this Digest, which covers the period from 1838–1867.

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the authority of *Ward* v. *Dyas* (1), they are decisive of the whole question. But in none of the cases which have referred to *Ward* v. *Dyas* (1) has any doubt been expressed that, however material such phraseology may be, when so used in a marriage settlement, all the provisions of the settlement must be regarded, and due weight given to each, before a true construction of the instrument can be arrived at. Here the words were "executed to trustees for the uses of the marriage." The words "as and for the portion or fortune" are applied to both of Crawford's bonds. But as regards the second £3000 there is clearly nothing given to Eliza but a life interest, and in default of issue there is an express ultimate limitation of the whole fund to her father. Again, the trusts of the first £3000, so far as declared, are quite inconsistent with the notion that Eliza Moutray was settling her own property. Then some argument was based upon Eliza having given up her rights under an earlier settlement. But what did she get? A life interest in £11,000 which in the events that happened lasted for sixty years. This was an ample equivalent. But at all events, when there was a substantial consideration for her surrender of pre-existing rights, the Court cannot in construing the settlement entertain the question of its adequacy.

As to the authorities, in *Doyle* v. *Crean* (2) there was in the deed conclusive intrinsic evidence that the daughter was to be the real owner of the property. It consisted of two funds, one of which was paid to the trustees of the settlement on its execution, the other, part of the father's residuary estate which he covenanted to bequeath, and did bequeath accordingly, to the daughter. *Sweetman* v. *Butler* (3) does not touch the present question. On the other hand, *The Attorney-General* v. *Biggs* (4), though nominally raising the question who was the predecessor, really depended on who was the settlor of the £5000 on which the duty was payable? [*Willock* v. *Noble* (5) was also cited.]

(1) Ll. & G. *temp.* Sugden, 177.
(2) [1905] 1 I. R. 252.
(3) [1908] 1 I. R. 517
(4) [1907] 2 I. R. 400.
(5) L. R. 7 H. L. 580.

Holmes, L.J. :—

The result of this appeal depends upon the construction of a settlement executed in the year 1842 on the marriage of the Rev. Thomas Moutray with Eliza Crawford. The sum put in settlement by the intended husband's father was £5000 secured by the bond of the father and his eldest son given to two trustees. The fortune or portion of the intended wife consisted of two sums of £3000, each of which was secured by the father's bond given to the same trustees. Judgments were obtained on these several bonds immediately after the marriage, and we have no reason to think that they were not excellent securities.

Before referring to the terms of the settlement, I desire to say a few words on a proposition that has been much referred to during the argument. I am of opinion that when a father settles property on his daughter as a fortune or portion on her marriage, and, by reason of the trusts being only partially stated, a resulting trust arises, such trust is *prima facie* in favour of the daughter and not of the father. I understand this to be the principle laid down in *Ward* v. *Dyas* (1) by Sir Edward Sugden when Lord Chancellor of Ireland in 1835, and followed in several subsequent cases in this country ; and I wish it to be understood that I cast no doubt on these authorities.

But of course this is only the law where a different intention does not appear either from the settlement itself or from other evidence ; and the result of this appeal depends upon whether such evidence exists. The settlement of 1842 seems to have been carefully drawn ; and I have no doubt that the draughtsman intended to state specifically the trusts exhaustively, so that no question of a resulting trust would arise ; and he seems to have carried out this intention successfully except in the case of one of the two sums of £3000 described as the portion and fortune of the wife.

There is no doubt that a life interest in all the settled funds was given to the husband, and after his death a similar life interest was given to the wife. On the death of the survivor, the funds were to be applied for the benefit of the issue of the marriage ; but it is unnecessary to consider the provisions

(1) Ll. & G. *temp.* Sugden, 177.

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relating thereto, as there was no issue. The husband died within two years after the marriage; his widow survived him by nearly sixty years; and her father died soon after the death of her husband.

Now, if there was nothing in the settlement beyond the gift of the life interests and the dispositions in favour of the issue of the marriage, I would hold, on the principle to which I have referred, that there was a resulting trust for the wife, and that her personal representatives would be entitled to the two sums of £3000. But, as I have already said, with the exception of one of the bonds to secure £3000, all the property put in settlement is completely disposed of by specific declarations, a consideration of which enables me to decide the question before us. In stating the dispositions of the settled property, I shall not mention those in favour of the issue of the marriage, and I shall first refer to those that relate to £5000, the husband's portion. The trusts thereof are complete. Subject to the life estates of the husband and wife in succession, the husband is empowered by deed or will to limit and appoint the sum of £2000, portion thereof in such manner as he shall think fit and proper, and if he shall not so limit and appoint, the entire sum of £5000 is to go and revert to the settlor, the husband's father. The trusts of the second sum of £3000, the wife's fortune, are, subject to her husband's and her own life estates therein, for her father, his executors and administrators.

I now come to the first-mentioned £3000 settled by the father on the daughter's marriage, and described with the second £3000 as her fortune or portion. It is declared in reference thereto that the wife, in case she should die in the lifetime of her husband without issue, shall be at liberty to appoint by her will, or a codicil thereto, the sum of £2000, part thereof, to such persons and in such shares as she shall think fit, and that the residue of such sum—that is to say the residue not so appointed—is not in such case to become payable, or to be raised or levied off the estates of her father, but shall enure to and for the use of him, his executors, and administrators. Now, it is admitted that if the wife were not to exercise the power thus conferred, and were to die in the lifetime of her husband, her father would become entitled

to this £3000; but it is argued that if she survived her husband, inasmuch as in such case no trust is declared, there is a resulting trust in favour of the wife.

I am of opinion that the intention of the settlement, taken as a whole, and especially as shown by the provision I have referred to, is that the only interest taken by her in the settled property, in addition to her life estate, is what is thus given her.

The trusts of the husband's portion help this construction. He is only given control over £2000, portion of the £5000 provided by his father; and it is a reasonable inference that the property was settled on the basis that the power of disposition over the capital sum of which their portions consisted should be confined to £2000. It is true that each has not the same power of disposition. The husband may appoint the £2000 by deed or will, either during coverture or after his wife's death. The wife could only appoint by testamentary disposition in the event of her dying in her husband's lifetime. I am unable to speculate as to the cause of this difference. The wife apparently believed that she could appoint by will the £2000 after her husband's death, for I find that she disposes of it by her will. It may be that this is a mistake on her part, or that there is a mistake in the drafting which could have been rectified if steps for that purpose had been taken in time, but it is now too late.

It does not, however, affect my inference that the only portion of the capital of her fortune in which she was given any interest was this sum of £2000; and that as, in the events that have happened, she could not make the appointment mentioned in the settlement, the whole of the £3000 is subject to a resulting trust in favour of her father.

I thought for a time that the division of her fortune into two sums of £3000, each secured by her father's bond, indicated an intention that the ultimate trusts thereof would not be the same; but I am satisfied that the only reason for the division was that the interest on the one sum began to run from a different date from that of the other. Were it not for this, her fortune of £6000 might have been secured by a single bond, as was her husband's of £5000.

I attach no weight to the argument that, in consideration

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of the fortune provided on her marriage, she gave up all claim or demand which she might have under her father's marriage settlement. As I have construed the settlement, she received ample consideration for the abandonment of this right.

For these reasons I am of opinion that the appeal must be disallowed.

CHERRY, L.J. :—

Speaking of marriage settlements, Gibson, J., in *Attorney-General* v. *Biggs* (1) states with his usual precision and accuracy, the law on the subject we have now to deal with, in the following terms :—" Where the declared trusts do not explicitly exhaust the property settled, the Court has to make its choice between resulting trust and an inference or implication of absolute gift. Resulting trust depends on the absence of intention in the settlor, in the event of failure or termination of the trusts, to make a final and complete alienation, and can only operate in favour of the settlor. The inference or implication of absolute gift arises where an intention to exclude any resulting trust appears, and there are words sufficient either in recital or elsewhere to show that the child, subject to the declared trusts, was to be treated as absolute owner."

I do not think it would be possible to state the effect of all the authorities more clearly and accurately than he has done in this passage ; and I proceed therefore to inquire, without further referring to the authorities cited by the appellants, whether, as regards the particular sum of £3000, as to which the question arises, there can be found in this settlement an inference or implication of an absolute gift to Eliza Crawford, the settlor's daughter, sufficient to exclude any resulting trust in favour of the settlor.

Two provisions in the settlement are relied upon by the appellants as indicating an absolute gift of this sum to the daughter. First, the reference to the sum of money as being " the marriage portion or fortune of the said Eliza Crawford," and, secondly, the fact that by the deed she surrendered her rights under the marriage settlement of her parents.

(1) [1907] 2 I. R. at p. 411.

The first argument proves too much for the appellants, for the description relied upon is applied to both sums of £3000, which are put in settlement by the lady's father;—and the ultimate trust of one of these sums, that with which we are not now concerned, is clearly expressed on the face of the deed to be for Andrew Crawford, the settlor, his executors and administrators. There is clearly no gift of this sum to the daughter, and the use of the words "marriage portion," therefore, cannot be relied upon as indicating such a gift.

The second argument really begs the question. It is true that the daughter by the deed surrenders her right to a portion of the trust funds under her parents' marriage settlement, and that such surrender constitutes part of the consideration for the settlement, but she gets in exchange only what the settlement gives her; and that is what we are endeavouring to ascertain upon the true construction of the deed. It does not at all follow that, because she surrenders her right to portion of a capital fund, she must necessarily obtain in exchange another capital fund. A life interest in a large sum may be a very good equivalent for an absolute interest in a much smaller sum; and by this settlement the daughter acquires undoubtedly a life interest in the sum of £11,000. I can, therefore, see no ground for inferring either from the use of the words "marriage portion," or from the fact that the daughter surrendered her rights under another settlement, that an absolute gift to her (subject of course to the trusts of the settlement) was intended of this sum of £3000.

But when we turn to the trusts which are actually declared of this sum of £3000, it is, to my mind, absolutely clear that no such gift was intended. The first trust, as regards both this sum and the other sums of £3000 and £5000 put in settlement, is to allow the husband to receive the interest on all three sums for his life. Then the wife is to be allowed to receive the interest on the same sums for her life; and the deed goes on to provide that if she shall depart this life during the lifetime of her husband without leaving any child or children of the marriage her surviving, she is to have a general power of appointment by will over the sum of £2000, part of this sum of £3000, but that subject to that power "the residue of said sum of £3000 is

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not in such case to become payable, or to be raised or levied off the estate, real or personal, of the said Andrew Crawford, but shall be and enure to and for the use of the said Andrew Crawford, his executors and administrators." How can it be argued in face of this provision that there was an absolute gift, *on the marriage*, of this sum of £3000 to the daughter? If she died childless, during her husband's lifetime, she had only the power to dispose by will of £2000 of it, and the residue which she did not so dispose of, was by the express terms of the settlement to go to the settlor, or rather he was declared not liable to pay it at all. Apparently also, if she made no will, the whole fund was to be treated in the same way.

Curiously enough, the deed makes no provision as regards this sum of £3000 for the converse case which actually happened, namely, the wife surviving her husband, and dying without issue. We are asked to read into the deed an ultimate trust in that event in favour of the daughter. It would be too late now to rectify the deed, even if we had evidence that such was the original intention of the parties. Not only is there no evidence of any such intention, but the general scheme of the deed points to the opposite conclusion, namely, an ultimate trust for the settlor. In the event of there being no children of the marriage the ultimate trusts both of the other sum of £3000 (the balance of the wife's fortune) and of the sum of £5000 (the husband's fortune) are for the settlors respectively, and the ultimate trust of this very sum itself in one event is also for the settlor. Why should we presume, in the events which have happened, an intention contrary to all the expressed intentions of the deed as regards the whole of the trust funds, both those put in settlement by the husband's father and by the wife's father?

For these reasons I am of opinion that the judgment of Wylie, J., was right, and that it should be affirmed.

HOLMES, L.J., stated that the LORD CHANCELLOR concurred in the judgment of the Court.

Solicitor for the objectors: *E. V. Hamilton.*
Solicitors for the owners: *Monroe & Anderson.*

W. G.

WEIR *v.* THE COUNTY COUNCIL OF FERMANAGH, AND THE RURAL DISTRICT COUNCIL OF ENNISKILLEN (1).

Appeal. 1913. Feb. 7, 9, 17.

(1912. No. 21.)

Local Government—County Council procedure—Proposal to make road—Necessity to include in proposal term for repayment of loan—Statutory rule—Mandatory or directory—Right of ratepayer to restrain Council—Joinder of Attorney-General—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *section* 60—*Local Government (Procedure of Councils) Order*, 1899, *Article* 13.

The plaintiff, a farmer and ratepayer in the Rural District of Enniskillen, sought an injunction to restrain the County Council and the said Rural District Council from acting on a resolution approving of a proposal of the Rural District Council to make a new road. The proposal formulated by the Rural District Council, and approved of by the County Council, did not embody any decision as to the number of years within which the money proposed to be borrowed should be paid off, pursuant to Article 13 (2) *a* of the Privy Council Order, of 30th January, 1899.

Held, by the Court of Appeal (affirming the decision of Ross, J.), that Article 13 (2) *a* was valid and consistent with section 60 of the Local Government Act, 1898, and that the proposal formulated by the District Council was accordingly defective and inoperative by reason of the aforesaid omission. But *held* (reversing the decision of Ross, J.), that the plaintiff was not legally competent to sustain the action, without the joinder of the Attorney-General, and that the action ought to be dismissed. Cherry, L.J., expressed no opinion on the first point.

THIS was an appeal from a decision of Ross, J. (reported *ante* at p. 63), giving judgment for the plaintiff in this action, which was brought for the purpose of obtaining a declaration that a resolution of the County Council of the 5th May, 1911, which approved of a proposal of the District Council adopted at a meeting of the 15th November, 1900, for the construction of a new road, was inoperative; that the proposal itself was bad; and for an injunction to restrain the Councils from carrying the proposal into effect.

(1) Before PALLES, C.B., and LORDS JUSTICES HOLMES and CHERRY.

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The proposal of the District Council did not embody any decision as to the term within which the money proposed to be borrowed for the construction of the road was to be paid off, as directed by Article 13 (2) *a* of the Privy Council Order of 30th January, 1899 (1).

Ronan, *K.C.*, *Harrison*, *K.C.*, and *Murnaghan*, for the appellants :—

1. Our first contention is that it is not competent for the plaintiff to sustain this action without having the Attorney-General joined to represent the public; otherwise each ratepayer affected could bring a separate action. It is not suggested that the proposed road will cause any damage peculiar to the plaintiff distinct from that to other ratepayers, as by passing through his land; and where the only objection to the proposal is based on what is, at the furthest, a technical slip, it is of vast importance that the discretion of the Attorney-General should be exercised as to whether the action should be instituted: *Devonport Corporation* v. *Tozer* (2); *London County Council* v. *Attorney-General* (3); *The Attorney-General* v. *Aspinall* (4); *Attorney-General* v. *Belfast Corporation* (5); *The Attorney-General* v. *Merthyr Tydvil Union* (6);

(1) By Article 13 (2) of the Local Government (Procedure of Councils) Order, 1899, it is provided—

"Where . . . the Rural District Council or proposal committee decide to adopt any application either in whole or in part, they shall cause a proposal to be formulated in accordance with their decision, and if the proposal is for the execution of a public work—

"(*a*) Shall decide whether the expense of executing the work should be defrayed by means of borrowing, and, if it is so decided, the number of years within which the money borrowed should be paid off, and shall cause their decision to be embodied as part of the formulated proposal."

Section 60 of the Local Government Act, 1898, is as follows:—

"The term within which a loan borrowed by the County Council is to be repaid shall be such period not exceeding sixty years, as the Council, with the consent of the Local Government Board, determine in each case, having regard to the duration of the work or object for which the loan is borrowed."

(2) [1903] 1 Ch. 759.
(3) [1902] A. C. 165.
(4) 2 Myl. & Cr. 613.
(5) [1898] 1 I. R. 200.
(6) [1900] 1 Ch. 516.

Evan v. *The Corporation of Avon* (1); *Watson* v. *Mayor of Hythe* (2); *Holden* v. *The Corporation of Bolton* (3); *Herron* v. *Rathmines Commissioners* (4); *Attorney-General* v. *Manchester Corporation* (5); *Tynemouth Corporation* v. *Attorney-General* (6).

2. The proposal passed by the County Council was not, in fact, bad on its face, owing to the omission of the number of years in which the borrowed money was to be paid off. The 13th clause of the Privy Council Order of the 30th January, 1899, is not mandatory, otherwise it would be inconsistent with section 60 of the Local Government Act, 1898, under which the term for repayment "shall be such period, not exceeding sixty years, as the Council," *i.e.*, the County Council, "with the consent of the Local Government Board, *determine*." If the 13th clause of the Privy Council Order of 30th January, 1899, be held to be mandatory, and it is essential to the validity of a proposal that the term for repayment of the loan be embodied, then, as under the same Privy Council Order the functions of the County Council are limited by sub-clause (2) of clause 20 to the approval or rejection of a proposal formulated by a Rural District Council, or under sub-clause (3) to refer back to the District Council the proposal, with a statement of the modifications required, in the case of the County Council and District Council being unable to come to an agreement with regard to the number of years over which the loan was to extend, the entire proposal would fall through, and the provisions of section 60 of the Local Government Act, 1898, would be rendered inoperative, as the power would be transferred from the County Council to the District Council. Accordingly, if clause 13 be mandatory, it is *ultra vires*, as contravening the statute itself; we prefer, however, to argue that clause 13 is not mandatory, and that the proposal is good on its face.

3. As to the effect of the resolution of the 24th February, 1911, rescinding that of the 13th January, 1911, we say that under section 4 of the Local Government Act, 1898, the original resolution was equivalent to the former fiat of a Judge, and

(1) 29 Beav. 144.
(2) 22 Times L. R. 245.
(3) 3 T. L. R. 676.
(4) 27 L. R. I. 179, at 247.
(5) [1906] 1 Ch. 643.
(6) [1899] A. C. 293.

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that as such a fiat could not afterwards have been touched by the grand jury, so the first resolution could not validly have been rescinded. If, however, the first rescinding resolution was valid, so also was that of the 5th of May, 1911, by which the original resolution was set up.

[They also referred to *In re Armagh and Caledon Road* (1), and to sections 17, 47, 69, 126 of the Grand Jury Act, 1836.]

S. L. Brown, *K.C.*, and *W. E. Wylie* for the respondent :—

We submit that the joinder of the Attorney-General in the action was unnecessary. No doubt if the plaintiff was suing simply as a member of the public, the Attorney-General would be a necessary party as representing the public, but here the plaintiff will suffer a peculiar damage, as he will be compelled to pay extra rates if the proposed road be made, and that damage entitles him to sue without the Attorney-General. This is recognized in many cases: *Ware* v. *Regent's Canal Co.* (2); *Winterbottom* v. *Lord Derby* (3); *Boyce* v. *Paddington Borough Council* (4); *Attorney-General* v. *Ashborne Recreation Ground Co.* (5); *Benjamin* v. *Storr* (6).

The question is not whether the plaintiff will suffer particular damage over and above other members of this class of ratepayers, but whether he will suffer that damage over and above other members of the public. The decision of Channell, J., in *Attorney-General* v. *Garner* (7) is expressly in our favour on this point, where he held that the rights which the Attorney-General interferes to protect as representing the Crown must be rights of the community at large, not those of a limited portion of the subjects of the Crown. It cannot be objected that this might lead to multiplicity of actions, to avoid which is one of the chief reasons for joining the Attorney-General, *Iveson* v. *Moore* (8), as the class to which the plaintiff belongs is strictly limited; also his action will finally conclude the matter. In any case the actions, if several were brought, could be consolidated.

(1) 2 Cr. & D. 462.
(2) 3 De G. & J. 212, at 218.
(3) L. R. 2 Ex. 316.
(4) [1903] 2 Ch. 56.
(5) [1903] 1 Ch. 101.
(6) L. R. 9 C. P. 400.
(7) [1907] 2 K. B. 480.
(8) 1 Lord Raymond, 486.

2. As to Article 13 (2) of the Privy Council Order of 30th January, 1899, we say that this is mandatory, but we contend that so far from being *ultra vires* as contravening section 60 of the Local Government Act, 1898, it is supplementary and necessary for the proper working of that section. The Rural District Council cannot borrow, except through the County Council, and in cases where the expenses of the work proposed are to be repaid by the District Council, and do not become county charges, the County Council is merely the agent for the District Council in borrowing the money; the County Council knows nothing about the number of years convenient and proper to be provided for the repayment of the loan, and the object of Article 13 (2) is that it should be compulsory on the District Council, the members of which have local and special knowledge of the circumstances of the case, to embody in the proposal sent forward to the County Council the number of years in which the loan should be paid off, so that the County Council should have materials before them to carry out the provisions of section 60 of the Act of 1898.

Ronan, in reply.

PALLES, C. B.:—

Feb. 17.

This is an appeal from an order of Mr. Justice Ross, whereby he declared that a proposal of the Rural District Council of Enniskillen, adopted at a meeting of the 15th November, 1900, for the construction of a certain new road within that district, at an estimated cost of £2,400, to be defrayed by the Rural District Council, was bad on its face and inoperative.

The suit is brought by a ratepayer in the Rural District, for the purpose of obtaining this declaration, and for an injunction against the District and County Councils carrying the proposal into effect.

Two matters have been relied upon in support of the appeal: one a matter of form and procedure, *viz.*, that a ratepayer has no title to maintain such an action, which it is insisted can be sustained only by the Attorney-General; the other a matter of much substance and importance, which arises on the construction of the Local Government Act, 1898, *viz.*, that where, as here, the

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amount required for the construction of the road is intended to be raised by loan, the assent of the District Council to the number of years over which the repayment of the loan shall be spread is essential, and should be stated in their proposal.

The suit is one to enforce the trusts attaching to the district rates, and to restrain their misapplication; and the trust so sought to be enforced is, in my opinion, plainly a public one. The rule in relation to such a suit is unquestioned: the plaintiff, or at least one of the plaintiffs, must be the public, represented by the Crown, who sues by its officer, the Attorney-General. In other words, before our Judicature Act, the suit should have been by information, or by information and bill, and not by bill merely. This rule is adopted from the Common Law, which in the case of an injury to the public—as, for instance, a ditch being made athwart a public way—gave for remedy originally "presentment in the leet," for which, later on, the present practice of indictment was substituted; unless, to use the words of Lord Coke (1), "any man hath a *particular* damage, as if he and his horse fall into the ditch, whereby he received hurt and losse, then for this special damage, *which is not common to others*, he shall have an action on his case"; and the reason of the rule is declared by Lord Coke to be "for the avoiding of suits, for if any one man might have an action, all men might have the like."

In the present case Mr. Justice Ross fully recognized the general rule, but held that the fact of the plaintiff being a ratepayer gave him a distinct cause of action. "He will be compelled," says the learned Judge, "to pay additional rates for the construction of the road. He has a right to protect himself against an illegal levy, if it is illegal." This, in truth, is a decision that the liability to additional rates is special or particular damage, within the meaning of the rule. With much respect, I am unable to adopt that view.

No doubt the plaintiff "has a right" to protect himself against an illegal levy of rates, and could successfully appeal against a rate struck upon an estimate which included a charge for this road, but he has in addition, in common with all other ratepayers,

(1) 1 Co. Litt. 56 (*a*).

a right to restrain the construction of the road; and if he can maintain this suit, to enforce this latter right, so can every other ratepayer; and thus there would be the multiplicity of suits which Courts of Equity, following the Common Law, hold to be an evil, and to avoid which they adopted a practice analogous to that of the Common Law. This practice, with this ancient origin, has endured to the present time, and has been uniformly applied in all cases in which either the public generally, or, as here, a particular class of the public, is interested. As an instance of the latter, I may refer to *The Attorney-General* v. *The Merthyr Tydvil Union* (1), as the question there was one which, at the time, excited great public interest, viz., the right of a person on strike to be relieved out of the rates. In that case the Attorney-General was not originally a party. It was brought by a ratepayer on the part of himself and all other ratepayers of the union—a limited class of the public—and the Attorney-General was subsequently added as a co-plaintiff. Lord Justice Romer (then Romer, J.) says, "Without doubt, in a proper case, this Court has jurisdiction *at the instance of ratepayers* to restrain guardians from applying the poor-rates for unauthorized purposes"; and as examples he refers to *The Attorney-General* v. *Southampton Union* (2) and *The Attorney-General* v. *West Hartlepool Improvement Commissioners* (3), showing that by the words "at the instance of ratepayers," he meant by the Attorney-General at their instance. In that suit relief was granted by the Court of Appeal—a course which would not have been taken were the Attorney-General improperly a co-plaintiff. Others of the cases cited by Mr. Ronan go further. In *Evan* v. *Corporation of Avon* (4), which was a bill by an individual member of a municipal corporation to restrain it from alleged unauthorized acts, the suit was dismissed, upon the ground that the relief could be obtained *only* upon an information by the Attorney-General; and the decisions of Lord Justice Stirling, then Stirling, J., in *Holden* v. *The Corporation of Bolton* (5), and

(1) [1900] 1 Ch. 516.
(2) 17 Sim. 6.
(3) L. R. 10 Eq. 152.
(4) 29 Beav. 144.
(5) 3 Times L. R. 676.

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of Warrington, J., in *Watson* v. *Mayor, &c., of Hythe* (1), are to the same effect.

As to the case relied upon by the plaintiff, *The Attorney-General* v. *Garner* (2), I do not say that the *decision* there was not right, having regard to the peculiar circumstances of the case; but I do venture to differ from the opinion, expressed by Channell, J., at page 487, that "the rights which the Attorney-General intervenes in order to protect . . . must be the rights of the community in general, and not the rights of a limited portion of His Majesty's subjects."

On this, the first ground relied upon in support of the appeal, I am of opinion that the plaintiff has no title to sue in this action.

As, however, the next objection was fully argued, and as all parties are desirous that we should express our opinion upon it, I proceed to do so. Upon it, the question is, whether the proposal of the District Council, which, under Article 13 (2) *a*, provides that the expense of the work shall be defrayed by means of borrowing, but omits to state the number of years within which the money borrowed should be paid off, is legal, or *ultra vires*?

Upon this question, I entirely agree in the conclusion at which Mr. Justice Ross has arrived, and for his reasons. It seems to me plain that the words in the Article in question: "shall decide . . the number of years within which the money borrowed should be paid off; and shall cause their decision to be embodied as part of the formulated proposal," are mandatory; not only because the grammatical sense of the words in the collocation in which they appear so requires, but because it is necessary so to construe them, to give effect to the policy of the Local Government Act, to give a District Council as much control over its annual expenditure as is consistent with the machinery which the Act provides for carrying its intentions into effect. This policy is evidenced by the provision in the 17th section of the Grand Jury Act—a policy which is carried into the Local Government Act procedure by Article 20 (2), which limits the

(1) 22 Times L. R. 245. (2) [1907] 2 K. B. 480.

power of the County Council as to the proposal, as the power of the Grand Jury was limited in the case of the associated cess-payers, to accepting or rejecting the proposal in its entirety, unless the District Council consents to its modification.

Thus, the question really comes to that which was so forcibly and elaborately argued by Mr. Ronan: Is this provision in Article 13 (2) inconsistent with the 60th section of the Local Government Act? If it be, then, notwithstanding the strong language of section 107 (1), it must in my opinion be held to be inoperative and null.

The question, however, is, is it inconsistent? In my opinion it is not. The section enacts—

"The term within which a loan borrowed by the County Council is to be repaid shall be such period, not exceeding sixty years, as the Council, with the consent of the Local Government Board, determine in each case, having regard to the duration of the work or object for which the loan is borrowed."

The loans referred to were loans which the Board of Public Works were by statute authorized to make to Grand Juries for certain specified purposes—purposes which include the construction of a new road, such as that in contemplation here. The terms within which those loans should be repaid were limited by the respective statutes, but none of them (as far as I am aware) extended so far as sixty years; but, on the other hand, none of them required the sanction of the Local Government Board. These powers were transferred from the Grand Jury to the County Council by section 4 of the Act, "subject to the provisions of the Act," and one of these provisions, section 60, extends the possible term of repayment, but imposes the necessity of the consent of the Local Government Board to that term.

Much reliance has been placed on the word "determine," which it was argued meant that the County Council should be left absolutely free to determine, free from all influence by the District Council, as if the determination were a judicial one. That, in my opinion, is not the meaning of the word in this section. I think the meaning of the section is that the Local Government Board and the County Council shall "agree" on the length of the term. The section confers a right of veto on the

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Local Government Board, which had not previously existed; but, in my opinion, it left the County Council free to be controlled by the circumstances of the particular case. The money, although borrowed by the County Council, is so borrowed for the District Council, and must be repaid by that Council to the County Council; and it must be so repaid by instalments dependent, as to amount, upon the term within which the repayment is to be concluded. It has not been contended that there is anything in the statute to prevent the District Council determining whether there shall be a loan in fact. Consequently, Article 13 (2) *a* is *intra vires*, so far as it provides that the proposal shall embody the decision of the District Council as to the fact of the loan being contemplated. Therefore the proposal may be made conditional on a loan being procured. If, then, the construction contended for be correct, when a proposal to construct a new road is before a District Council, they must either provide for the cost out of their current rates without a loan, which will in the majority of cases be impossible; or, by making a proposal to construct it with a loan, must expose themselves to the risk of being compelled to proceed with its construction, although the term for repayment be so fixed as to impose what they consider to be an unreasonable rate of taxation upon the district. Section 27 (2) of the Act imposes a limit upon the amount of a rate without the consent of the Local Government Board; and although the words of this enactment throw the obligation of non-approval upon the County Council only, it is plainly right and necessary that the District Council, in proposing works, should have regard to its provisions; and they cannot do so unless they have power to make their proposal for a new work conditional on the yearly expense not exceeding a given maximum.

Upon the whole, then, I am of opinion that it is not contrary to the Act that a District Council, when making their proposal to construct a new road, make it conditional upon the loan being obtained on the terms of its being repaid within a specified minimum period; and I am confirmed in this view by section 17 of the Grand Jury Act of 1836 (6 & 7 Wm. 4, c. 116), which authorized a presentment being made conditional upon the expense thereof not exceeding a particular sum. It is true that this section has not, in terms, been applied under the Local

Government Act to District Councils; but it might have been applied by Order of the Privy Council, and the construction of the Act cannot depend upon the exercise of the powers conferred by it. It shows that the proposals of District Councils—which have been substituted for the presentments under section 17—need not necessarily have been absolute on their face; and Article 13 (2) *a* does no more than give effect to the principle of this provision by enabling a condition as to yearly expense, instead of as to the gross expenditure, being made part of the proposal. In construing the Local Government Act, I think I best carry out its policy by giving to the District Council (in relation to proposals to be made by them for works to be paid for by their district) as great autonomous powers as are consistent with the language of the Act; and, accordingly, I construe section 60 of the Act as defining the relations between the County Council, borrowing for the benefit of the District Council, on the one hand, and the Executive Government, as lender of public moneys, on the other; and not at all as interfering with the relations *inter se* of the County and District Councils—relations which I regard as foreign to the intention of the section. Construing the section thus, if the period for repayment proposed by the District Council be one of which the Local Government Board or the County Council does not approve, the latter, under Article 20 (3), may refer back the proposal to the District Council, with a statement of the necessary modification of the proposal; and thus there will ultimately be either an agreement between the County and the District Council, or the matter will fall through.

For these reasons, I am of opinion that Article 13 (2) *a* of the Procedure of Councils Order is *intra vires*; that its provisions are mandatory; and that, as those provisions are mandatory, Mr. Justice Ross was right in holding that the resolution of the District Council, which omitted to state the number of years within which the money should be repaid, was bad on its face and inoperative.

The case is not one, having regard to the rateable value of the plaintiff's holding, in which we should allow the case to stand over to enable the plaintiff to obtain the consent of the Attorney-General; but as his contention has been in substance right, although he fails in form, I think each party should abide his own costs.

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HOLMES, L.J. :—

This action is brought by the plaintiff to restrain the County Council and the Rural District Council that are made defendants from carrying into effect a proposal to form, fence, and stone 640 perches of a new line of road from Belcoo to Derrygonnelly through the lands therein described, at an estimated cost of £2400, and that the expenses of said work be defrayed by the Rural District.

This proposal was adopted by the Rural District Council on the 19th July, 1910, and was on the 15th November following amended by adding thereto "Loan to be acquired by the County Council." In this form it was submitted to and passed by that body on the 13th January, 1911. Its subsequent history is stated in the pleadings; but in the view I take of the case, it is unnecessary for me to consider it, or to offer any opinion thereon.

It is not denied that such a proposal as that with which we are dealing must originate with the Rural District Council, and that the jurisdiction of the County Council is confined to considering and adjudicating on it. This is provided by the Privy Council Order made under the statute, the legality of which has not been, and cannot be, questioned.

The Order, however, prescribes not only that there is to be such a proposal, but directs what the proposal is to contain. It must, where it is proposed, as in this case, to make a new road, state the line of the proposed road and its estimated cost.

I assume that these requirements have been fulfilled in this case; but the 13th clause of the Order of the 30th January, 1899, goes further than this. This clause provides that the proposal is to contain the decision of the District Council whether the expense of executing the work should be defrayed by means of borrowing, and, if it is so decided, the number of years within which the money borrowed should be paid off. It is obvious that when this Order speaks of deciding, it cannot mean a final decision. The object of the proposal is to submit to the County Council what the District Council desires should be done; but the function of the former is stated to be either to approve or disapprove of

what is proposed, and, if it disapproves, to send back the proposal for further consideration, with the cause of its disapproval.

The principal ground relied on by the plaintiff for the injunction sought for in this action is that the proposal of the District Council was bad and inoperative by reason of its containing no statement of the number of years within which the money borrowed should be paid, and that, therefore, the approval of the County Council was nugatory. But, before the plaintiff can claim relief on this ground he must show, in answer to a defence pleaded by the Council, that he is legally competent to maintain this action. When the *locus standi* of a plaintiff to put the law in motion is challenged, this would seem to be logically the first question to be argued and decided in the suit; and both before Ross, J., and in this Court, it was given this priority.

The County Council and the Rural District Council have been called into existence by statute for the purpose of performing many public duties in the county and district, of which not the least important are the maintenance of old roads and the making of new ones. In performing these duties in the manner provided or contemplated by the statute, and the orders and rules made thereunder, they would incur no liability; but they may act in violation or in excess of their authority, in which case the law supplies a remedy to the persons injured thereby. It is, I think, well settled that the nature of the remedy depends upon the character of the injury. If the illegal act causes damage to an individual such as a trespass to his land, he can sue the Council in the same way as he can proceed against any other trespasser; but if the alleged injury is one common to the public generally, or to a special class of the public, the practice has been that the Attorney-General is put in motion, by one or more of such public or class, to vindicate their rights; and I am of opinion that this is the only legal method in which such rights can be enforced.

There could hardly be a better instance of such an injury as that to which I have last referred than that of which the plaintiff complains. He is a ratepayer in the rural district; and if the proposal be carried out, he will be obliged to pay a small rate, but in this respect he is in precisely the same position as every other

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ratepayer therein. After the judgment of the Lord Chief Baron it would be waste of public time for me to refer to the authorities in support of the proposition I have stated. The only answer given to the long list is that in most of them the question was not raised because the Attorney-General had been made a party, but could there be a better proof that this was the law and practice of the Courts? There is but one case relied on by the plaintiff, a decision of Channell, J., with which, if it cannot be distinguished, I am unable to agree.

It follows from what I have said that I hold that the appeal ought to be allowed. But if the Court were to stop here, the appellants would be placed in a position of embarrassment, as if we left the validity of the proposal an open question, the County Council would not know whether it ought to be carried out or not. I have, therefore, no objection to state my opinion on this branch of the case. I see no reason for not construing the Order of the 30th January, 1899, including its 13th clause, as mandatory, and that, therefore, if there is authority under the statute to make it, the proposal of the District Council was void, as it failed to comply with its terms, in that it did not state the number of years within which the money borrowed should be paid off. The only answer given to this is that the portion of the Order requiring this statement is repugnant to section 60 of the Act of 1898, which enacts that the term within which a loan borrowed by the County Council is to be repaid shall be such period, not exceeding sixty years, as the Council, with the consent of the Local Government Board, shall determine in each case, having regard to the duration of the work or object for which the loan is borrowed. As put by Mr. Ronan in his argument, the effect of the Order prescribing that the statement in question is to be contained in the proposal is, if mandatory, to give the District Council the power to veto what is provided by section 60 of the Act, and, therefore, this part of the order is illegal.

I am unable to see the repugnancy, and I think the word "veto" as thus applied is misleading, although it would appropriately describe the power given to the Local Government Board by section 60 to withhold its consent. I have already pointed out that when the Order speaks of the District Council

deciding, it cannot mean finally deciding. The proposal merely submits for the consideration of the County Council what the District Council desires. If the first-named body agrees with what is proposed as to the period within which the loan is to be repaid, it will, in the words of section 60, determine that to be the period by approving of the proposal, either before or after ascertaining whether the Local Government Board will consent thereto. If it does not agree, it will inform the District Council of its disapproval, and of the grounds thereof. This may lead to a further proposal and its acceptance by the County Council; and if the Local Government Board consents to the period therein stated, the work goes on.

If, on the other hand, the District Council declines to alter the proposal so as to make it acceptable to the County Council, the matter comes to an end. So far as the proposal is concerned, it seems to me that the statement therein as to the period of repayment is similar to the other statements as to the nature of the work, the estimated cost, and whether the expenses are to be defrayed by loan.

Unless an agreement on all these matters is come to between the two Councils, nothing can be done; but even where there is agreement, the consent of the Local Government Board to the period of repayment must be obtained as a condition to defraying the expenses by loan. For these reasons I see no contradiction or inconsistency between section 60 and the provisions of the Order.

Therefore, if the plaintiff had been entitled to bring the action, I should have decided this question in his favour.

CHERRY, L.J.:—

Upon the first question which has been argued in this case, namely, the right of a ratepayer, as such, to maintain an action to restrain a County Council from acting *ultra vires*, I am in complete agreement with the other members of the Court. In *Evan* v. *Corporation of Avon* (1) it was laid down in the clearest

(1) 29 Beav. 144.

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terms by Sir John Romilly, then Master of the Rolls, that a suit against a corporation to compel the performance of a public trust, or to restrain a breach of trust, should be by an information by the Attorney-General at the instance of all or some of the persons interested in the matter. The suit in that case was brought by a member of the corporation to restrain the sale of certain lands; and, inasmuch as the plaintiff's alleged rights were in his corporate and not in his individual capacity, a demurrer to the bill was allowed.

That case was decided in 1860, now more than fifty years ago, and its authority has never, so far as I can ascertain, been since questioned. The practice has invariably been to institute such suits in the name of the Attorney-General, at the relation of the person or persons who are interested in the matter. If the plaintiff is right in this case, the Attorney-General was in all these cases an unnecessary party.

It is true that there is not to be found in the reports any express decision by the Court of Appeal, or any higher tribunal, that such an action as the present is not maintainable at the instance of an ordinary ratepayer, who does not allege any interest or liability to damage other than what is common to him and all the other ratepayers of the district. This is probably, however, because it has never been argued before such a Court that the action lies. In two cases, to which we have been referred, actions such as the present one were sought to be maintained by individual ratepayers, but in both instances they failed.

The case of *Holden* v. *Corporation of Bolton* (1) is an express decision of the very point now before us by a Judge of very high authority in England, Stirling, J. That was an action by a ratepayer to restrain the Town Council from expending money out of the borough fund, for what, it was contended, was an illegal purpose, namely, the illumination of public buildings on the occasion of the Jubilee of Queen Victoria. The preliminary point was taken that the proper person to sue was the Attorney-General; and Stirling, J., held that he was the only person who could sue in such a case. "Here, the plaintiff," he said, "was suing in his

(1) 3 Times L. R. 676.

individual capacity as a ratepayer, and it was said that he had a personal interest because, by the proposed application of the fund, the borough rate would be increased. But if hereafter any rate was improperly made, the plaintiff would have his remedy."

Watson v. *Mayor of Hythe* (1) was an action by certain burgesses of a borough to restrain the council of the borough from giving a consent under the standing orders of Parliament to a bill for authorizing the laying down of a tramway along a certain public highway upon the ground that the resolution of the council authorizing the consent was not passed in accordance with the laws under which the affairs of the borough were conducted. It was held by Warrington, J., on the authority of *Evan* v. *Corporation of Avon* (2), that, the action being one to compel the performance of a public duty, it was not maintainable without the concurrence of the Attorney-General.

It is true that in both these cases the question came before the Court upon motion at an early stage of the proceedings, and the action was not, in either case, dismissed, but the motion was allowed to stand over to enable the Attorney-General to be made a party. Here this course cannot be adopted, as the case has proceeded to judgment. We must therefore, in my opinion, follow the precedent laid down by Sir John Romilly in *Evan* v. *Corporation of Avon* (2), and dismiss the action, if we are of opinion that the law is properly laid down in that case, and in the two cases of *Holden* v. *Corporation of Bolton* (3) and *Watson* v. *Mayor of Hythe* (1).

For my part I have no doubt that these cases correctly represent the law on this subject, and for this reason I think that the present action must fail.

Upon the second question which was argued before us, namely, that as to the regularity of the proposal put forward by the district council, I desire to express no opinion, as it is not necessary for the decision of the case for me to do so. It is a difficult and doubtful matter, and my mind fluctuated very much upon it during the arguments.

(1) 22 Times L. R. 245.
(2) 29 Beav. 144.
(3) 3 Times L. R. 676.

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I concur in the judgment of the Court reversing the decision of Ross, J., in favour of the plaintiff in the action.

Solicitors for the plaintiff (respondent); *Clarke & Gordon.*

Solicitor for the County Council of Fermanagh (appellants): *Charles F. Falls.*

R. ST. J. C.

OLPHERTS *v.* CORYTON.

Barton, J.
1912.
July 31.

Administration of assets—Executor's right of retainer—Specialty and simple contract creditors—Hinde Palmer's Act, 1869 (32 & 33 *Vict. c.* 46).

It has never been the practice in Ireland, in the administration of assets, to form two funds, one in respect of specialty debts, and the other in respect of simple contract debts, for the purpose of postponing an executor's simple contract debt to specialty debts. The executor may retain his simple contract debt as against both specialty and simple contract creditors, inasmuch as, by Hinde Palmer's Act, both classes of creditors are made of equal degree as regards priority of payment in the administration of estates.

The *ratio decidendi* of the Court of Appeal in England, in *In re Samson* ([1906] 2 Ch. 584), and the opinion of Neville, J., in *In re Jennes* (53 Sol. Journ. 376), applied in support of the executor's right of retainer.

Wilson v. *Coxwell* (23 Ch. D. 764), and *In re Jones*: *Calver* v. *Laxton* (31 Ch. D. 440), not followed.

This action was brought for the administration of the estates of Mrs. Elizabeth Olpherts, and of her husband Richard Olpherts, both of whom died in 1892.

An application was made on behalf of Messrs. Lionel Wynne, and Rev. Henry Haworth Coryton, as personal representatives of the original plaintiff, Francis Montgomery Olpherts, to vary the Chief Clerk's certificate by allowing them to retain (*inter alia*) two sums of £1,000 and £3,000 respectively, which they or their immediate testator had paid as surety for Richard Olpherts, whose estate was being administered in this action. Francis Montgomery Olpherts had claimed such right of retainer in his own lifetime. [The application included other matters with which the present report is not conversant.]

Garrett Walker, K.C., for the applicants:—

The original executor, Francis Montgomery Olpherts, in his lifetime, by an affidavit filed in this action, asserted his right of retainer; but in any case he was the sole executor of Richard Olpherts, and the chain of representation has not been broken. We are therefore entitled to stand in the shoes of the first executor, Francis Montgomery Olpherts.

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Serjeant Matheson, K.C., and *Henry Cole Bowen*, for William Denis Brown, who had been admitted as a specialty creditor of Richard Olpherts:—

An executor who is merely a creditor by simple contract cannot exercise his right of retainer against creditors by specialty. This point has been expressly so decided by Pearson, J., in *Wilson* v. *Cocwell* (1); by Kay, J., in *In re Jones*; *Culver* v. *Laxton* (2); by Chitty, J., in *In re Briggs*; *Earp* v. *Briggs* (3); and by Stirling, J., in *In re Bentinck* (4).

G. M'Gusty, for Mrs. Louisa Olpherts, another specialty creditor of Richard Olpherts, also resisted the application.

John Leech, K.C. (with him *Barry Meade*), for the plaintiffs (the present executors and trustees of the will of Richard Olpherts) having carriage of the proceedings:—

In the opinion of the Court of Appeal in England, as expressed in the case of *In re Samson*, *Robbins* v. *Alexander* (5)—see specially the observations of Fletcher Moulton, L.J., at page 592—the effect of Hinde Palmer's Act was to abolish for all purposes distinction between specialty and simple contract creditors. This Court should follow the opinions expressed by the Judges in the Court of Appeal in *Samson's Case* (5). Neville, J., would have followed these opinions in *Re Jennes* (6), if he had not felt himself bound (as this Court is not) by the previous decisions of Judges of co-ordinate jurisdiction in England. The only question for the Court appears to be whether it should adopt the principle laid down by the Court of Appeal in England in *Samson's Case* (5), or the practice of the Courts of first instance, which is inconsistent with that principle and with the practice hitherto existing in this country.

BARTON, J.:—

[After disposing of other questions]:—

There remains the question of the executor's right to retain his simple contract debt as against specialty creditors. The

(1) 23 Ch. Div. 764.
(2) 31 Ch. Div. 440.
(3) [1894] W. N. 162.
(4) [1897] 1 Ch. 673.
(5) [1906] 2 Ch. 584.
(6) 53 Sol. Journ. 376.

executor is entitled to retain his debt in priority to other creditors of equal degree, as the Vice-Chancellor observed in *In re Simpson* (1) in reference to secured and unsecured creditors. But neither in that case nor in any other case in Ireland have two funds been formed, one in respect of specialty debts, and the other in respect of simple contract debts, for the purpose of postponing an executor's simple contract debt to specialty debts. I have consulted the Chief Clerk to this Court and the Chief Clerk to the Court of the Master of the Rolls; and they tell me that in their long experience they have never formed, and have never been asked to form, two funds for that purpose. The English decisions which support the practice of forming two funds were impliedly condemned by the Court of Appeal in England, in *In re Samson* (2), as being erroneous and in direct conflict with the provisions of Hinde Palmer's Act. In *In re Jennes* (3), Neville, J., was of the same opinion; but as *Re Samson* (2) was a case of preference, not of retainer, he felt bound to follow the previous English decisions, of which he disapproved, as they were not expressly over-ruled.

As no such practice has ever existed in Ireland, I am at liberty to apply to this case the *ratio decidendi* of the Court of Appeal, and the opinion of Neville, J. It seems to me that the executor may retain his simple contract debt as against both specialty and simple contract creditors, inasmuch as by Hinde Palmer's Act both classes of creditors are of equal degree.

The executor's right of retainer extends only to legal assets which have come actually or constructively to his hands. I am not asked upon the present application to decide whether any, and if so what, legal assets have come to his hands. That question will, I understand, be raised by another motion.

Solicitors for the applicants: *H. T. Dix & Son.*
Solicitors for the plaintiffs having carriage: *Crookshank, Leech, & Davies.*
Solicitor for Mrs. Olpherts: *Harford Kelly.*
Solicitors for William Denis Brown: *Colles & Ward.*

R. W. L.

(1) [1895] 1 I. R. 530.
(2) [1906] 2 Ch. 584, 591, 592.
(3) 53 Sol. Journ. 376.

Ross, J.
1913.
Jan. 21.

In the MATTER of the ESTATE of JOHN I. D. KERR.

Will—Construction—Executory devise over on a contingency—Restricted to time prior to period of distribution—Vesting of estate.

In a will, where there is a period of distribution, a gift over on death means death before the period of distribution.

A testator devised all his property to trustees on trust for the support and maintenance of his wife and daughter, and any other of his children, and directed the trustees, when any child or children should attain twenty-one years of age or marry, to apportion the property equally among them, subject to an annuity to his wife. The will contained a proviso directing that, in the event of the said daughter dying during the lifetime of her mother, she should have a life use of the estate, and on her decease it should become the absolute property of testator's brother. The daughter attained twenty-one years of age and married, but predeceased her mother.

Held, that the property vested absolutely in the daughter at twenty-one or marriage, and was not divested by the proviso.

Question arising on ruling of title by the Examiner.

The lands forming the estate in the matter were sold to the tenants under the Irish Land Act, 1903, for over £3000. The title to the lands sold commenced with the will of John Isodore D'Arcy, dated 17th August, 1849.

The testator, by his will, gave all his property to trustees "in trust for the support and maintenance of my dearly beloved wife Charlotte, and the support, maintenance, and education of our dear little daughter, Jane Mary D'Arcy, and for the support, maintenance, and education of any other child or children of mine by my said wife Charlotte. And when my daughter, or any other child or children, as the case may be, shall attain the age of twenty-one years, or day of marriage, then I further will and direct that my said trustees shall apportion my said estate and other property equally between them, subject nevertheless to the annual sum of £100 to their mother, to be paid on her sole and separate receipt. But, as soon as my said dearly beloved wife, Charlotte, shall become possessed of the reversionary interest in land and

money expectant on the death of her mother, then I desire that my said trustees shall, in the first place, apply the proceeds of my estate and other properties towards the education of my said daughter, Jane Mary, and other child or children yet unborn, as the case may be. In the event of my said daughter, and any other child or children of mine dying during the lifetime of their mother, then I direct that she shall have a life use of all my estate and property, and on her decease that it shall become the absolute property of my dearly beloved brother, Dominick D'Arcy."

The testator had issue two children only, namely, the said Jane Mary D'Arcy, and a posthumous child who was born in November, 1852, and died a few months later. The said Jane Mary D'Arcy married John Eyre Fortescue Kerr, and died on 12th November, 1908. Her mother, the said Charlotte D'Arcy, survived her said daughter, and died on 4th February, 1909.

The Examiner submitted to the Judge the following question:— Whether, upon the true construction of the will of John Isodore D'Arcy, the said executory limitation over therein contained on the death of the daughter took effect in the events which happened?

Leet, for the vendors, the children of testator's daughter:—

Where there is a period of distribution, a gift over on death means death before the period of distribution: Hawkins on Wills, 1912 edition, p. 305. A bequest to A on his attaining twenty-one, and in case of his death to B, is a gift absolute to A on attaining twenty-one: *Home* v. *Pillans* (1); *Desbody* v. *Boyville* (2); *Knapp* v. *Noyes* (3); *West* v. *West* (4); *Duggan* v. *Kelly* (5). In *Osborn* v. *Brown* (6) the Court referred the event, on the happening of which the legacy was to be revoked, to the time during which the payment was suspended. In the present case payment is suspended till the age of twenty-one years or marriage.

(1) 2 My. & K. 15.
(2) 2 P. W. 547.
(3) Amb. 662.
(4) 4 Giff. 198.
(5) 16 Ir. Eq. R. 473.
(6) 5 Ves. 527.

Ross, J.
1913.

In re KERR'S ESTATE.

The Hon. Cecil Atkinson, for Eleanor Mary D'Arcy, daughter of Dominick D'Arcy.

All the cases cited were antecedent to the Wills Act. Where the latter part of a will is inconsistent with a prior part, the latter part will prevail: *Sherratt* v. *Bentley* (1); *In re Lupton* (2). The words in this will amount to an executory devise over on the happening of a certain event: *Lyon* v. *Mitchell* (3); *Monck* v. *Croker* (4); *Gravenor* v. *Watkins* (5); *Gatenby* v. *Morgan* (6).

Ross, J.:—

This is the will of an educated man, but not a lawyer. In construing wills the duty of the Court is to find out what is the intention of the testator, and then to consider whether the intention is defeated by some rule of law or of construction. What is the intention here? In the first place, there is a trust for the support of the wife and the daughter and any other of the children. We have the testator, up to a certain point, providing for his wife and the children of his family. Then the testator directs that, when his daughter or any other child of his attains the age of twenty-one years or day of marriage, the trustees are to apportion the estate equally among the children, subject to an annuity of £100 to their mother. Up to this period, only maintenance was provided; thenceforward a new arrangement is made and the testator apportions his entire estate subject only to the £100 annuity. The whole of the rest of his property is given absolutely among the children of his marriage. The words of the gift are sufficiently clear. The children are the natural object of the testator's bounty. When the daughter attains twenty-one, his wife is to have £100 a year and the daughter everything else.

The next clause also helps to show the general intention. If the wife gets a certain reversionary interest the whole of the testator's property is to be spent on the education of the children. That obviously applies to the minority of the children, but it

(1) 2 M. & K. 149.
(2) [1905] P. 321.
(3) 1 Madd. 467.
(4) [1900] 1 I. R. 56.
(5) L. R. 6 C. P. 500.
(6) 1 Q. B. D. 685.

helps to show that the primary intention of the testator was to benefit the children.

Then comes an executory gift in a proviso, wherein the testator directs that, in the event of his daughter dying during the lifetime of her mother, the property shall go over to his brother, subject to a life interest given to the mother. Here we come to rules of construction. A plain gift is not to be taken away or cut down unless by very clear words. Does the proviso mean that, in the event of the daughter dying, whether leaving children or not, the property should go to the testator's brother? This is not a reasonable construction. It is plain that the intention was otherwise. The other principle laid down in the cases cited in argument is, that the all-important time is the period of vesting, and, where there is a gift and a gift over in case of death, that the event of death ought to be limited to the lifetime of the testator. Following that principle, the event in the present case which would divest the property must be construed to be an event happening before the period of the vesting. Therefore I hold, on the construction of the will, that the property vested in the daughter, and was never divested.

Solicitors for the vendors: *William Fry & Son.*
Solicitor for Eleanor Mary D'Arcy: *W. J. Shannon.*

D. M. S.

Appeal.
1913.

GOODISSON *v.* GOODISSON (1).

Feb. 13, 14, 21.

Will—Execution—Attesting witness contradicting his previous evidence.

Appeal by the defendant from the judgment of the Master of the Rolls, *ante*, p. 31, where the case is fully reported.

James O'Connor, *K.C.*, and *Carrigan*, *K.C.* (with them *D. J. O'Brien*), for the appellant.

S. L. Brown, *K.C.*, and *H. Wilson*, *K.C.* (with them, *Poole*), for the respondent.

Feb. 21.

The Court of Appeal on the facts unanimously reversed the judgment of the Master of the Rolls. Their Lordships gave no opinion on the questions relating to the Local Registration of Title (Ireland) Act, 1891, which were argued.

Solicitors for the appellant: *M. J. O'Connor & Co.*
Solicitor for the respondent: *M. Lane Horan.*

W. G.

(1) Before the Lord Chief Baron, and Lords Justices Holmes and Cherry.

IN RE NATIONAL INSURANCE ACT, 1911. THE CASE OF PUPIL TEACHERS AND MONITORS.

Barton, J.
1912.
March 6, 12.

National Insurance Act, 1911—*National Education (Ireland) Act—Pupil teachers and monitors—Contract of service—1 & 2 Geo. 5, c. 55, s. 1 (1) (3), section 66, sub-section 1 (iii), first schedule, Part I. (a).*

The employment of pupil teachers and monitors in National Schools in Ireland is an employment within the meaning of the National Insurance Act, 1911, and the Commissioners of National Education are the employers. It is not a contract of apprenticeship, because an essential element of apprenticeship—the right to receive instruction—is absent from the contract; but is a contract of service within the meaning of Part I., section 1 (1), of the National Insurance Act, 1911.

MOTION by the Commissioners of National Insurance in Ireland under section 66 (1), (iii) of the National Insurance Act, 1911, (1 & 2 Geo. 5, c. 55), for the determination of the question whether the employment of pupil teachers and monitors in National Schools in Ireland was employment within the meaning of Part I., section 1 (1), of the National Insurance Act, 1911 (1), and, if so, who was the employer.

The material facts were as follows :—

The Commissioners of National Education in Ireland appoint pupil teachers and monitors in the National or Model Schools

(1) 1 & 2 Geo. 5, c. 55, Part I., sect. 1 (1)—"Subject to the provisions of his Act, all persons of the age of sixteen and upwards who are employed within the meaning of this part of the Act shall be . . . . insured in manner provided in this part of this Act . . . ."

"FIRST SCHEDULE.

"Employments within the meaning of Part I. of this Act relating to Health Insurance.

"(*a*) Employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether expressed or implied, or whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece, or partly by time and partly by the piece, or otherwise, or, except in the case of a contract of apprenticeship, without any money payment."

Barton, J. 1912.

In re National Insurance Act, 1911 (Pupil Teachers and Monitors).

under statutory rules. National schools are under the direction of patrons who appoint the teachers (not pupil teachers or monitors) subject to the Commissioners' rules, while the Model schools are directly under the direction of the Commissioners. The rules relating to pupil teachers and monitors are as follows:—

The Teaching Class of National Schools.

Rule 75 (*b*)—The following are eligible for appointment as assistant teachers . . . . (3) monitors and pupil teachers on completing their period of service and passing the King's Scholarship Examination in their final year (see rules 145 and 156).

Monitors and Pupil Teachers. (1)

130. The monitors are appointed by the Commissioners upon the recommendation of the inspectors, who select them by competitive examination, except as provided in rule 139.

131. The inspectors recommend candidates for monitorship only in schools in which the organization, methods of instruction, premises, furniture, apparatus, and accommodation are satisfactory.

132. The inspectors confer with the managers and principal teachers of the schools as to the character and general suitability of the candidates whom they have selected, and they are prohibited from recommending candidates of whom the managers disapprove, or to whom the teachers entertain a reasonable objection.

133. (*a*) The inspector recommending the appointment of a monitor must certify that he has explained to the teacher—

1. that the monitor must not be employed in teaching for more than two hours in each day during his period of service except in his final year, when he may be employed for three hours in each day; (2)

2. that, except in the case of monitors whose general education is provided for in neighbouring Intermediate schools, the monitor must be carefully instructed along with the pupils of the school

(1) The same regulations as to appointment, qualifications, salary, and period of service apply to monitors and pupil teachers in model schools as to those in ordinary schools.

(2) In the case of pupil teachers and monitors whose general education is provided for in neighbouring Intermediate schools, the time during which they are required to teach in the National schools may, at the discretion of the manager, be limited to one hour in each day during the first year of service.

or allowed to study by himself under the teacher's supervision during the remainder of the daily school time;

3. that the monitor must receive extra instruction regularly in the monitorial course outside of school hours, for at least three-quarters of an hour in each school day of the week, or for half an hour in each school day, and two hours on Saturday.

4. that the principal teacher must preside over formal criticism lessons to be given by the monitors once in each week. In a school where one monitor only is employed, one lesson each fortnight is considered sufficient.

(*b*) The Commissioners are prepared to sanction arrangements made by the managers, under which monitors of different schools may receive their extra instruction at specially fixed centres or their general and extra instruction at Intermediate schools. The extra instruction may be given in different subjects by different teachers, and should not be for less time than one hour a day.

134. The school for which a monitor is recommended must, as a rule, have had an average daily attendance of not less than fifty pupils for the preceding calendar year.

135. The maximum number of monitors that may, as a rule, be recognized in any school is set forth in the following table; but the Commissioners reserve to themselves the right to determine whether this maximum should be sanctioned:—

Average Attendance.			Monitors.
50	but under	85,	1
85	,,	130,	2
130	,,	175,	3
175	,,	220,	4
220	,,	265,	5
265	,,	310,	6
310	,,	355,	7

and so forth.

136. A monitress is not recognized in:—

(1) a boys' school in which there is not an assistant mistress, unless it is an infants' school or department under a mistress;

(2) a mixed school under a master, unless

(*a*) she is a near relative of the teacher: or

(*b*) a mistress is charged with her extra instruction, or is always present at it: or

(*c*) during the time of her extra instruction a respectable woman is present, or some other monitresses or girl pupils; or

(*d*) her extra instruction is given at a special centre [rule 133 (*b*)];

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(3) any school in which there is not adequate provision for instruction in needlework.

137. The number of monitors being limited, the managers should understand that they have no claim to the appointment of monitors merely on the ground that the conditions specified in these rules have all been fulfilled.

138. The monitors are appointed from the 1st July in each year. The candidates for monitorship must be not less than fifteen and not more than seventeen years of age on the 1st July, and they must answer satisfactorily in the prescribed programme.

139. Students who have passed in the junior or middle grade under the Board of Intermediate Education are eligible for appointment as monitors without undergoing further examination, except in reading aloud and any ordinary school subject in which the candidate did not pass at the Intermediate examination, should the Commissioners require it. In each case the candidate must be recommended by the local inspector after a personal interview.

140. The full period of service and training of monitors is three years. Their service counts from the 1st July in the year of their appointment and all appointments are subject to the fulfilment of the conditions below specified as regards good conduct and efficient instruction.

141. The candidates for monitorship must furnish a registrar's certificate of the date of their birth, a medical certificate that they are of a sound and healthy constitution, and free from any physical or mental defect likely to impair their efficiency as teachers, and a written undertaking to become National school teachers.

142. The monitors must undergo a yearly examination in the prescribed courses.

143. The annual examinations of the monitors in the prescribed courses are held in their schools except in the final year, and on each occasion the monitors must exhibit to the inspector all the exercise books written by them in the course of the year, and the monitresses must also exhibit specimens of their needlework.

144. (*a*) The examination of monitors of the final year is held at Easter in each year in the King's scholarship programme.

(*b*) The monitors are annually awarded service marks. In the case of monitors in their final year who are candidates for admission to Training colleges, these marks are added to the total marks obtained at the King's scholarship examination.

145. The monitors who pass the King's scholarship examination in the first or second division, and who complete their service satisfactorily, are eligible for appointment as assistants (see rule 76) within three years, as a rule, from the termination of their service as monitors.

146. The attendance of monitors who receive their general instruction in the school in which they are serving as monitors must be recorded daily on the rolls, and be included in calculating the average daily attendance of pupils.

147. The salary granted to a monitor may be withdrawn at any time should want of diligence, of efficiency, or of good conduct on the part of the monitor, or any other circumstance, render such a course desirable.

148. When a vacancy in a monitorship occurs, whether before or on the expiration of a monitor's term of service, it does not necessarily follow that a successor will be appointed.

149. A monitor cannot be transferred, even temporarily, to another school without the express sanction of the Commissioners; but where a girls' school or a mixed school is associated with an infants' school in the same premises, the monitors of each department may be permitted to devote a portion of their time to teaching and practising in the other department.

150. (*a*) The following is the scale of salaries for monitors:—

	Boys.	Girls.
	£	£
First year, ...	10	8
Second year, ...	15	12
Third year, ...	20	16

(*b*) For monitors appointed under the former regulations the scale is as follows:—

	Boys.	Girls.
	£	£
First year, ...	5	5
Second year, ...	6	6
Third year, ...	8	8
Fourth year, ...	12	10
Fifth year, ...	18	16

151. (*a*) Pupil teachers are eligible for appointment in all schools which are officially recorded as, at least, "very good," and are appointed, as a rule, from 1st September. They are selected (as far as possible in order of merit) from students who have "passed with honours" in the junior, middle, or senior grade, under the Board of Intermediate Education, not more than two years prior to their appointment as pupil teachers. In each case the candidate must be recommended by the local inspector after a personal interview.

(*b*) The inspectors confer with the managers and principal teachers of the schools as to the character and general suitability of the candidate pupil teachers, and they are prohibited from recommending candidates of whom the managers disapprove, or to whom the teachers entertain a reasonable objection.

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(*c*) The managers who desire to have pupil teachers appointed to their schools should make application to the Commissioners not later than 1st July, and submit the names of eligible candidates. Pupil teachers are, as far as possible, appointed to schools in the district in which they reside.

(*d*) Pupil teachers, if appointed for three years, must not be employed in teaching for more than two hours in each day during the first year, and three hours in each day during the second and third years. Those appointed for two years must not be employed in teaching for more than three hours in each day during their period of service.

152. The candidates for pupil teacherships should forward their applications to the Secretaries not later than 1st July.

153. The period of service for pupil teachers is three years for those who have "passed with honours" in the junior grade, and two years for those who have "passed with honours" in the middle or senior grade.

154. The candidates for pupil teacherships are required to furnish satisfactory evidence of age, a certificate of character from a clergyman, a medical certificate that they are of sound and healthy constitution, and free from any physical or mental defect likely to impair their usefulness as teachers, and a written undertaking to become National school teachers.

155. Pupil teachers must at the end of each year of service pass a qualifying examination, conducted by the Board's inspectors, for retention during the following year. In lieu, however, of this qualifying examination in any subject they are allowed the option of presenting themselves for the Intermediate examinations in the corresponding course.

156. (*a*) The examination of pupil teachers of the final year is held at Easter in the King's scholarship programme, and those who pass this examination, in the first or second division, and who complete their service satisfactorily, are eligible for appointment as assistants within three years from the termination of their service as pupil teachers.

(*b*) Marks for good service are considered in connexion with this examination.

Note.—Rules 133 [except 133 (*a*) 1], 136, 137, 146, 147, and 148 are also applicable to pupil teachers.

157. The scale of salaries for pupil teachers is as follows:—

	First Year.	Second Year.	Third Year.
	£	£	£
(1) Pupil teachers who have passed with honours in the junior grade. (Boys),	18	24	30
,, ,, ,, (Girls),	14	20	26
(2) Pupil teachers who have passed with honours in the middle or senior grade. (Boys),	24	30	—
,, ,, ,, (Girls).	20	26	—

When a pupil teacher is appointed, the following letter is sent by the Commissioners to the pupil teacher :—

Board's Order.....

County..... Roll No..... School.....

ADVICE OF GRANT OF SALARY TO PUPIL TEACHER.

OFFICE OF NATIONAL EDUCATION,

DUBLIN, , 1912.

. . . . . .

We are directed by the Commissioners of National Education to inform you that they have appointed you as pupil teacher in the above-named school, under the provisions of Rules 151 to 157 of the code.

This appointment dates from the 1st September, 1912, and is sanctioned subject to the production of satisfactory certificates of age and health and the furnishing of a written undertaking to become a National school teacher (1). Salary will be payable from the date of entering on duty, and you should at once communicate with the manager of the school with a view to taking up your appointment.

Should the evidence of age or of health be unsatisfactory, the appointment will be cancelled.

The Commissioners also reserve to themselves the right of cancelling the appointment whenever, *for sufficient reason*, they may see fit to do so.

We are,

. . . . . .

Your obedient Servants,

P. E. LEMASS,

W. J. DILWORTH,

Secretaries.

(1) The certificate of health should be on the form annexed, and should be forwarded with the Registrar's certificate of age by the manager to this office as soon as possible. Until this has been done, salary for services rendered cannot be paid.

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A precisely similar form is sent to a monitor on appointment. The pupil teacher or monitor then signs the following document :—

FORM TO BE FILLED BY MONITORS AND PUPIL TEACHERS ON APPOINTMENT TO NATIONAL SCHOOLS.

(In pursuance of terms of Rules 141 and 154.)

County ..... Roll No. ..... School .....

I ..... hereby agree and declare in consideration of my being recognized as* ..... in the above-named school under the provisions of the Rules of the Code of the Commissioners of National Education, Chap. XI., that I will endeavour to quality myself thoroughly for the calling or occupation of teacher, and that so soon as I shall be duly declared so qualified I will adopt and follow that calling or occupation in a National School or as a teacher in public elementary schools of Great Britain, in the Army or Navy, or in Poor Law Schools, certified Industrial Schools, or certified Reformatories in the United Kingdom, if afforded opportunity of such employment.

* Here insert whether Pupil Teacher or Monitor.

Signature .....

Date .....

At the expiration of each quarter, after appointment, the pupil teacher or monitor makes the following application for salary :—

MONITORS AND PUPIL TEACHERS.

County .....

I.—Application for Salary.

Name of Manager, ...

Address, ...

Money Order Office where payable .....

Roll No. ..... *School,* .....

I hereby make application to the Commissioners of National Education to grant the sum of ..... *Pounds,* ..... *Shillings, and* ..... *Pence, as SALARY for Service rendered by the undersigned** ..... *in the above-named National School, during* ..... *Months in the Quarter ended the* ..... *day of* ..., 19 , *at £*..... *per annum, and I certify that this application is just and proper.*

(* State whether Monitor or Pupil Teacher.)

£ : : *Amount.* *Signature of Manager* .....

Signature of Monitor, &c., ...

Date ..... *day of* ..... 19 .

Note. Must not be certified or dated before the close of the Quarter.

The Solicitor-General (*Molony*, *K.C.*), and *Gerald Horan*, for the Commissioners of National Insurance, cited *Re Employment of Church of England Curates* (1); *Re Employment of Poor Law Officers* (2); *Re Methodist Ministers* (3).

J. H. Pigot, *K.C.*, and *James Sealy*, for the Commissioners of National Education:—

The contract here is not to be performed within the year: Rules 140, 151. There is no contract in writing, and, therefore, under the Statute of Frauds there is not such a contract as can be relied on here: *Kirkby* v. *Taylor* (4).

Even assuming that there is a contract which can be relied on, that contract, to come within the Act, must be either of service or apprenticeship. It cannot be successfully contended that there is a contract of service, for the Commissioners have not the control of the pupil teachers or monitors. It is clearly not a contract of apprenticeship, for in order to be such a contract there must be mutual rights and duties; the master must be under an obligation to instruct as well as the pupil to work. Such is not the case here. There is no obligation on the Commissioners or the master of the school to provide instruction for the pupil teachers and monitors. Further, if the contract is one of apprenticeship, it is inequitable as entered into with an infant: *Reg.* v. *Lord* (5); as the salary may be withdrawn at any time without remedy by the pupil teacher or monitor (Rule 147). The true relation between the Commissioners and pupil teachers and monitors is that of persons providing bursaries to encourage scholars.

E. V. Longworth, for the pupil teachers and monitors:—

As to the Statute of Frauds there is here a complete written contract in the correspondence and rules. Assuming that there is a contract of apprenticeship, the Commissioners cannot be heard to rely on the inequity of that contract in order to avoid their obligations under it. But the real contract here is one of service with all the essentials of such a contract. The pupil teachers and monitors remain under the control of the Commissioners.

(1) [1912] 2 Ch. 563.
(2) 47 L. T. R. 28.
(3) 28 T. L. R. 539.
(4) [1910] 1 K. B. 529.
(5) 12 Q. B. 757.

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Mar. 12.

The duties performed by the pupil teachers and monitors are referable to that contract, and not, as in the case of clergy in *Re Employment of Church of England Curates* (1) or Poor Law officers in *Re Employment of Poor Law Officers* (2), to duties appertaining to their office by common law or statute.

BARTON, J.:—

In this case the Insurance Commissioners have submitted to the Court the question whether employment as pupil teachers and monitors in National Schools in Ireland is an employment within Part I. of the National Insurance Act, 1911, and if so who is the employer.

It is conceded that the employers, if any, are the Commissioners of National Education; and the point which has been argued, is whether there is as between these young persons and the Commissioners of National Education any contract of service, or of apprenticeship, within the meaning of Schedule 1 (*a*) of Part I. of the Act.

It is, I think, clear that a contract of some kind is concluded in each case between these young persons and the Commissioners. This contract is contained in letters, which follow a printed form, and are filled up and signed by the secretaries of the Commissioners on the one side, and the young persons on the other side. These letters contain mutual promises and undertakings, and create mutual rights and obligations. The result is a contract. The letters incorporate Chapter XI of the Rules of the National Board, which comprises twenty-eight rules regulating the appointment, dismissal, duties, and salaries of these monitors and pupil teachers. The Commissioners appoint them on the recommendation of their inspectors, who select them in the manner provided by the rules. The appointment is conveyed to the candidate in a letter stating that it is made under the rules and regulations, subject to the production of satisfactory certificates of age and health, and the furnishing by the candidate of a written undertaking to become a National School teacher, and that the Commissioners reserve the right of cancelling the appointment whenever, for sufficient reason, they may see fit to do so. This letter is headed "Advice of Grant

(1) [1912] 2 Ch. 565. (2) 47 I. L. T. R. 28.

of Salary to paid Monitors," or "to Pupil Teachers." The candidate writes a letter in reply, agreeing and declaring that in consideration of being recognized as a monitor or pupil teacher, under the provisions of the Commissioners' Rules, Chapter XI, he will endeavour to qualify himself for, and will adopt the calling or occupation of teacher in a National School, or in certain other branches of the public service. These letters, together with the rules which they incorporate, create a contract of some sort. The only question is, whether or not, when read with the rules which they incorporate, they create a contract of service or apprenticeship. If they create a contract of service or of apprenticeship, these monitors and pupil teachers must be insured under the National Insurance Act; if, on the other hand, they do not create a contract of service or apprenticeship, the employment of these monitors and pupil teachers is not an employment within Part I. of the Act.

At first sight the relation of these parties presents a superficial resemblance to the contract of apprenticeship, because these pupil teachers and monitors are young persons, and it is contemplated that they should gain practical experience of, and be instructed in, the calling of a teacher. But when the contract is examined, it will be found that an essential element of the contract of apprenticeship is absent. The Commissioners do not undertake to teach or to provide teaching for these young persons. Such teaching is contemplated, and as a matter of fact is provided; and the Commissioners require their inspectors to explain to the National School teachers their duty of giving such instruction. But I cannot find that the contract between these young persons and the Commissioners of National Education imposes any obligation upon the latter to provide instruction. As a matter of fact, they provide it; but they are under no contractual obligation to do so. If no instruction were provided, the young persons would have no legal remedy. It is essential to the contract of apprenticeship that the apprentice should have a right to be taught. I find no such contractual right here. That being so, whatever this contract may be, it is not a contract of apprenticeship.

Although the monitors and pupil teachers have not a right to be taught, they are bound under the rules to teach diligently and efficiently. Accordingly, the question remains whether there is a

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contract of service. I have come to the conclusion that there is such a contract, and that the essential elements of a contract of service are present in this case. I do not know of any universal test, or hard-and-fast definition, which can be applied to cases of this kind. In every case it is a question of fact and of the construction of the contract. There are, however, some well-known incidents of the contract of master and servant, such as the duty of the servant to personally execute work for the master; the possession by the master of the power of appointment, selection, dismissal, and control; and the liability to pay wages or remuneration to the servant. In the present case the teacher is bound to execute work personally; and the power of appointment, selection, and dismissal is clearly possessed by the Commissioners. They exercise the right of selection through their inspectors. They exercise the right of appointment themselves. When making the appointment, they expressly reserve a right of cancelling it for sufficient cause; and by Rules 147 and 156 (note) they reserve a right of withdrawing the salary for want of diligence, efficiency, &c.

As regards the question of remuneration, it was suggested in a letter of the Commissioners that the payments which they make to these monitors and pupil teachers are not salaries for services rendered, but are bursaries. By bursaries I understand the Commissioners to mean grants or prizes intended to help scholars to maintain themselves. I agree that the element of a bursary enters into this monitorial system. But the payments are described as "salary" in the letters of appointment, and in Rules 147, 150, and 157. The young persons in question are referred to in the rules as "employed" and "employed in teaching" (see Rules 133 (*a*) 1 and 4, 151 (*d*)), and as "serving" (Rule 46). Their employment is described in several places as "service." Their three years' employment is referred to as a "period of service," a "period of service and training," and a "term of service." (See Rules 133 (*a*), 140, 145.) Their appointments are subject to conditions imposing on them the obligation of giving efficient instruction (see Rule 140), and their salaries may be withdrawn at any time for, *inter alia*, want of diligence or efficiency. I infer from the rules and from the terms and language of the contract that, although the element of a bursary may enter into the policy and

intention of the monitorial system, the predominating character of the contract is that of a contract for the payment for services.

There remains the important question of control. These monitors and pupil teachers are for certain purposes under the control of the managers and teachers of a school. But that state of affairs may be consistent with a contract of service with the Commissioners. The control which is exercised by the managers or teachers arises out of the circumstances of the employment. It flows from the contract with the Commissioners, and is a delegated control for and on behalf of the Commissioners. The Commissioners, by their summary power of dismissal, really remain in supreme control. It is to the Commissioners that the monitors and pupil teachers owe their duty under the contract, and the Commissioners are the only persons who can ultimately enforce the authority of the managers or teachers, or insist upon the performance of the promises and obligations contained in the contract and in the incorporated rules.

Two recent cases were referred to in the course of the arguments. These were the case of the *Curates of the Church of England* (1), decided by Parker, J., now Lord Parker; and the case of the *Poor Law Officers in Ireland* (2), decided in the present sittings by the Master of the Rolls in Ireland. These cases are clearly distinguishable from the present case. The curates are holders of ecclesiastical offices. Any authority which is exercised over them by their bishop or rector is exercisable by virtue of ecclesiastical jurisdiction. Their rights and duties do not depend upon contract. The poor law officers' rights and duties are regulated by statute, and not by contract. In the present case these monitors and pupil teachers are the creation of the Commissioners' Rules, and all their rights and duties depend upon a contract, which is to be found in the letters of appointment and acceptance, and in the rules which are incorporated in those letters.

For reasons which I have given, I am of opinion that the employment of monitors and pupil teachers in National schools is an employment within the meaning of the National Insurance

(1) [1912] 2 Ch. 563. (2) 47 I. L. T. R. 28.

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Act, 1911, and that the Commissioners of National Education are the employers.

Solicitor for the Commissioners of National Insurance: *John F. Culhane.*

Solicitor for the Commissioners of National Education: *John M. Maxwell.*

Solicitors for the monitors and pupil teachers: *Maxwell & Weldon.* E. C. F.

M. R. 1912.
Nov. 18.
1913.
Feb. 4.

In re BRAZIER CREAGH'S TRUSTS; HOLMES *v.* LANGLEY.

(1912. No. 190.)

Will—Special Power of Appointment—Change of Investment—Ademption of appointed share.

A testatrix had under her marriage settlement a life interest in £900 Government 3 per cent. Irish Consolidated Annuities, with power to appoint the same to her children. At the date of her will the annuities had been sold, and the proceeds invested in New Zealand Bonds.

By her will, after reciting that she was possessed of New Zealand Bonds, amounting to the sum of £900 or thereabouts, and bank and other shares, she bequeathed the New Zealand Bonds and the shares to her daughter, not referring in any way to the settlement. The New Zealand Bonds were afterwards sold, and the proceeds invested in Consols, and so remained at the date of her death.

Held, that the will was an appointment of the New Zealand Bonds only, and that, as they had ceased to form part of the trust funds at the death of the testatrix, when the will operated, the appointment failed, and the trust fund went as in default of appointment.

Summons.

This was an application on behalf of Kate Phœbe Langley, a legatee under the will of her mother, Catherine Frances Brazier Creagh, to have it declared—(1) that the following words in the will, "Now I devise and bequeath the said New Zealand Bonds unto my daughter Kate Phœbe Langley, and it is my wish that she shall hold the same, and also receive the income to be derived therefrom for her life, and it is my wish that she shall

give the said shares to my grand-daughter, Dorothy Kathleen Emily Langley, absolutely" constituted a valid exercise of the power of appointment conferred upon the said Catherine Frances Brazier Creagh, by the settlement executed on her marriage with John Brazier Creagh, dated July 19th, 1859; and (2) that upon the true construction of the said words in the said will the said appointment was an absolute one in favour of Kate Phœbe Langley.

The parties to the proceedings were Major Robert Holmes and Kate Phœbe Langley, the trustees of the settlement, Kate Phœbe Langley as legatee, and the infant children of George Creagh and Sydney Creagh, deceased, sons of the testatrix, who survived her, and would have been entitled in default of appointment.

The other facts of the case are sufficiently stated in the head-note and in the judgment, from which it will be seen that it was not necessary to decide question 2.

Garrett Walker, K.C., for the trustees of the settlement.

Carrigan, K.C., for Kate Phœbe Langley :—

The gift of the New Zealand Bonds was a good exercise of the power of appointment, apart from the question of the subsequent change of investment; the testatrix dealt with them as if they were her own property, but she had no New Zealand Bonds, except those which were the subject of the power. There was no ademption of the legacy given by the will by reason of the change of investment. He referred to *In re Johnstone's Settlement* (1); *Blake* v. *Blake* (2); *Willett* v. *Finlay* (3).

Swayne, for the persons entitled in default of appointment :—

If the New Zealand Bonds had been the property of the testatrix, the gift would have failed, as the thing given no longer existed, and there would have been an ademption of the legacy. For the purposes of the question whether an appointment under a

(1) 14 Ch. D. 962.
(2) 15 Ch. D. 481.
(3) 29 L. R. Ir. 156.

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testamentary power has been adeemed by subsequent dealings with the appointed property, no distinction is to be drawn between general and special powers. *In re Dowsett*: *Dowsett* v. *Meakin* (1); *Beddington* v. *Baumann* (2). The intention here was to dispose of the New Zealand Bonds only, not to dispose of the trust fund, in whatever form it might be invested; she treats the New Zealand Bonds as her own property, and does not refer to the power.

Carrigan, K.C., in reply:—

In *In re Dowsett* (1) it was real estate which was changed; Farwell, J., did not dissent from *In re Johnstone's Settlement* (3). In *Beddington* v. *Baumann* (2) other property came into existence after the date of the will. If the donee of the power had the property at the date of the will, and disposed of it, the changing into another security did not avoid the gift.

1913.

Feb. 4.

O'CONNOR, M.R.:—

Two questions have been submitted for the decision of the Court in this case—(1) Whether the will of Catherine Frances Brazier Creagh, dated the 10th September, 1904, was a valid exercise of the power of appointment contained in the settlement executed on her marriage with John Brazier Creagh; and (2) whether the appointment (if valid) was absolute or for life only.

By the settlement, which was dated the 19th day of July, 1859, and made between the said John Brazier Creagh of the first part, the said Catherine Frances Brazier Creagh by her then name of Holmes of the second part, and Francis Edward Holmes and Robert Franklin (trustees) of the third part, a sum of £900 Government 3 per cent. Irish Consolidated Annuities, which had immediately prior to the execution of the settlement been transferred into the names of the trustees, was settled upon trust to pay the interest, dividends, and annual proceeds to the said Catherine Frances Brazier Creagh for life, and after her decease, whether the said John Brazier Creagh should then be living or

(1) [1901] 1 Ch. 398.
(2) [1903] A. C. 13.
(3) 14 Ch. D. 962.

not, upon trust to transfer the said securities, or whatever other securities should then represent the trust funds and the interest, dividends, and annual proceeds thereof, to such child or children, or such one or more thereof to the exclusion of the other or others, in such shares and proportions, and to vest at such time and times, and in such manner as the said Catherine Frances Brazier Creagh, whether under coverture or not, should, by any act or deed, or by her last will and testament, direct or appoint; and in default of such appointment, or so far as the same should not extend or be operative, in trust to transfer and assign the same to all the children of the said marriage, share and share alike. The settlement contained a power to vary the investments with the consent of the said Catherine Frances Creagh. There was issue of this marriage four children, of whom Kate Phœbe Langley is one. John Brazier Creagh, the husband, died on the 1st August, 1885, leaving Catherine Frances Brazier Creagh, his widow, him surviving. She made her last will, dated 10th September, 1904.

By this will, after reciting that she was possessed of New Zealand Bonds amounting to the sum of £900 or thereabouts, and also shares in the Provincial Bank amounting to the sum of £300 or thereabouts, and also of some money on deposit receipt in the Provincial Bank, she dealt with the property she had described in the following words:—"I will, devise, and bequeath the said New Zealand Bonds, the said shares in the Provincial Bank, the said shares in Gouldings, and any money on deposit receipt in the Provincial Bank as aforesaid at my death, to my daughter, Kate Phœbe Langley, and it is my wish that she shall hold the same, and also receive the income to be derived therefrom for her life, and it is my wish that on and after her death she shall give the said shares unto my grand-daughter, Dorothy Kathleen Emily Langley, absolutely." After some other devises and bequests, which need not be referred to, the testatrix appointed her daughter, Kate Phœbe Langley, her residuary legatee.

Previous to the date of the will the trustees of the settlement had sold out the £900 Irish Consolidated Annuities, and invested the proceeds in New Zealand Bonds of the amount mentioned in the will, the income of which had been paid to the testatrix. She had therefore, at the date of the will, a power of appointment

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among her children over these New Zealand Bonds, or any funds which should thereafter represent them. She had no interest in, or claim to, any other New Zealand Bonds. Therefore, when she recited in her will that she was possessed of New Zealand Bonds, she must have referred to those in settlement; and when she proceeded to dispose of them, she must have intended to dispose of the property which was in settlement. But she purported to dispose of it in language which was only applicable to property belonging to her and not to property over which she had only a special power of appointment. The question arises, Was the power executed at all?

It is essential to the valid execution of a special power that there should be an intention to execute it. This intention is to be gathered from the language of the whole instrument executing the power, but, as a general rule, there must be either a reference to the power or to the property the subject-matter of the power. In the latter case an intention to execute the power is imputed to the person making the disposition, because it is only by the exercise of the power that he can dispose of it: *Minchin* v. *Minchin* (1); *Saunders* v. *Carden* (2).

Now, in the present case, the testatrix purports to bequeath New Zealand Bonds which she has no power to dispose of except under the power contained in her marriage settlement. She must, therefore, be taken to have intended to execute the power. So far, then, the power was well executed, but after the execution of the will the New Zealand Bonds were sold by the surviving trustee, and the proceeds were re-invested in Consols, so that at the death of the testatrix there were not any New Zealand Bonds subject to the trusts of the settlement. This raises the question whether the appointment was adeemed by the change of investment.

The law upon the ademption of appointments under powers is now well settled, and it is stated thus in Lord Justice Farwell's treatise on Powers, contained in Halsbury's Laws of England, vol. xxiii, p. 42, par. 80:—"Where there is a change in the character of the property subject to the power subsequent to its execution by will, the answer to the question whether the

(1) I. R. 5 Eq. 272. (2) 27 L. R. I. 43.

subsequent dealing has effected an ademption depends upon whether, upon the true construction of his will, the testator has appointed the property subject to the power, in whatever way invested, or whether he has appointed a specific property and nothing else. The test to be applied is whether his expressed intention is to execute his power, whatever may be the property subject to it at his death, or to give a particular estate, his title to dispose of which happens to arise from power and not from property. In this respect there is no distinction between general and special powers." See *In re Dowsett*, *Dowsett* v. *Meekin* (1), and *In re Moses*, *Beddington* v. *Beddington* (2).

In the will I am now considering there is no mention of anything subject to the settlement but New Zealand Bonds. This property is specifically dealt with, but nothing else. There is nothing in the will to indicate that she intended to deal with the moneys or investments which might afterwards represent the New Zealand Bonds. There was, therefore, an appointment of the New Zealand Bonds and nothing else. These had ceased to be part of the trust estate at the death of the testatrix when the will operated, and I must hold that the appointment failed, and that the trust fund went as in default of appointment.

It becomes unnecessary to answer the second question.

All parties must have their costs out of the trust estate.

Solicitor for the plaintiffs: *T. L. Overend.*

Solicitors for the defendants: *W. J. Magnier*; *V. Kilbride.*

W. L.

(1) [1901] 1 Ch. 398. (2) [1902] 1 Ch. 100.

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1912.

Nov. 21, 22.
Dec. 2, 10.

HIS MAJESTY'S POSTMASTER-GENERAL *v.* NENAGH URBAN DISTRICT COUNCIL.

Urban sanitary authority—Supply of water for domestic purposes—Post Office premises not on valuation list and not rated—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *sections* 44, 49, 50, 53.

Section 53 of the Waterworks Clauses Act, 1847, provides as follows:—

"Every owner and occupier of any dwelling-house or part of a dwelling-house . . . . shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water-rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

The plaintiff, who was the occupier of premises used as a post office within the district supplied by the defendants, which premises were not entered on the valuation list and were not rated, demanded a supply of water for domestic purposes, but did not strictly comply with all the regulations made by the defendants, and was unable to agree with the defendants as to the proper amount to be paid by them for the water-supply.

Held, that the premises not being rated, the defendants could not insist on prepayment of water-rate by the plaintiff as a condition precedent to their supplying the plaintiff with water, and that the plaintiff was entitled to a supply of water for domestic purposes as of right, subject to his complying with the requirements of the rules and regulations of the defendants, and on payment of the value of the water supplied, which value should, if necessary, be ascertained in Chambers.

TRIAL OF ACTION.

The facts and the sections of the statutes referred to in the arguments sufficiently appear in the judgment of Ross, J.

The Attorney-General (*The Right Hon. Ignatius J. O'Brien, K.C.*), *A. W. Samuels, K.C.*, and *H. MacDermot*, for the plaintiff.

Serjeant Matheson, K.C., Ronan, K.C., and *A. E. Corbett*, for the defendants.

The following cases were referred to:—*The Queen* v. *Cruise* (1); *South-West Suburban Water Company* v. *St. Marylebone Union* (2); *Metropolitan Water Board* v. *Phillips* (3); *Dublin Cemeteries Committee* v. *Commissioner of Valuation* (4); *Harte* v. *Holmes* (5); *Dublin Corporation* v. *Guardians South Dublin Union* (6).

Ross, J.:— Dec. 10.

In this action the Postmaster-General claims that he is entitled to receive a supply of water to the Nenagh Post Office for domestic purposes, on the same terms as if the premises were occupied otherwise than for the public service.

The defendants are the Sanitary Authority for the Urban District of Nenagh, and they have under the Public Health Acts provided a supply of water for the district.

The Postmaster-General holds under a lease. The lessor is rated in respect of the half rent, but the Post Office premises being Crown property are exempt from rates. The Crown pays a bounty in lieu of rates on the premises held for Crown purposes in the district. Communication pipes have been laid connecting the post office premises with the public mains, and the post office now enjoys an adequate supply of water.

The action is brought to determine what are the respective rights of the parties, and, if the plaintiff is entitled, by what means the amount payable in respect of the water-supply is to be ascertained. No rate for water-supply has been struck. A sum of £10 per annum is demanded by the defendants. This sum the plaintiff contends is excessive, and he refuses to pay it. He is willing to come in as an ordinary subject, and pay the same as the ordinary inhabitant. But the amount paid by the ordinary inhabitant is not capable of accurate ascertainment.

The defendants take up the bold position that under the circumstances they can charge what they like for the water. They contend that there is no power conferred by the statute under which they can be compelled to supply the water required by the plaintiff, unless on their own terms.

(1) 2 Ir. Ch. R. 65.
(2) [1904] 2 K. B. 174.
(3) [1912] 1 Ch. 296.
(4) [1897] 2 I. R. 157.
(5) [1898] 2 I. R. 656.
(6) 1902, not reported.

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Under section 65 of the Public Health Act of 1878, a sanitary authority is bound to provide, and keep in waterworks constructed or purchased by them, a supply of pure and wholesome water. This section is imperative. They are further required to lay pipes for the supply of the inhabitants. The dominating purpose of the statute is to compel them to have an adequate supply of pure and wholesome water available for the use of the inhabitants. It is not contemplated that they should have it in their power to withhold the supply for domestic uses from any inhabitant. Furthermore, they are compellable to lay it on constantly at such pressure in their pipes as will carry the same to the top story of the highest dwelling-house within the district. What is intended is a supply of water for domestic purposes available for all.

But the water may be required for other than domestic purposes, and the sanitary authority is empowered to enter into agreements for such a supply. How is the sanitary authority to enforce payment of the expenses? It would appear that the Legislature contemplated a rate in respect of the domestic supply, and an agreement in respect of the supply required for other purposes. Under section 66, where a sanitary authority supply water to any premises, they may charge a water-rate to be assessed on the net annual value of the premises; moreover, they may enter into agreements for supplying water with the persons receiving the supply, and they may recover water-rents or other moneys payable under the agreements in a summary manner.

Under section 67 of the Public Health Act there are incorporated the provisions of the Waterworks Clauses Act, 1847, with respect to the communication pipes to be laid by the undertakers and with respect to the communication pipes to be laid by the inhabitants.

We turn first to section 44 of that Act, dealing with pipes to be laid by the undertakers. It is imperative on the undertakers, in a case where the annual value does not exceed £10, upon request of the owner or occupier, to lay down and maintain communication pipes; but there must be payment or tender of the proportion of the water-rate in respect of such house, by the Waterworks Act, or the special Act, made payable in advance; and thereupon the occupier of such house shall be entitled to

have a sufficient supply of water for his domestic purposes from the undertakers. The undertakers may charge for such pipes and works, in addition to such water-rate, such reasonable annual rent as shall be agreed upon; but they are not allowed to exact such rent as they choose. In case of dispute they must submit to have the rent settled by an outside party.

This section is for the benefit of the poorer inhabitants who might not be able to afford the expense of construction of communication pipes. The section contemplates the existence of a water-rate made payable in advance by statute. But where there is no rate, or where it is not payable in advance, how can the payment or tender be a condition precedent to the performance of their duty? An impossible condition can never be a condition precedent at all. Section 45 inflicts severe penalties on the undertaker for refusal to lay the communication pipes.

We now turn to the case where pipes are laid down by the inhabitants. The provisions deal with the case of a more wealthy class of owners or occupiers, who are able to pay at once for the construction of the pipes. Again, we must observe that the undertakers are not complete masters of the situation. In case of dispute as to the strength and material of the pipes, the dispute is to be settled by an outside body. The same provision, that is, reference of disputes to an outside authority, appears again in section 49, where two days' notice is required to be given by the person laying down the communication pipes to the undertakers, and in case of dispute as to the manner in which the pipes shall communicate, there is a reference to the same outside authority. By section 50, the bore of the pipes, where no limit has been prescribed, is not to exceed half an inch, except with the consent of the undertakers.

We now come to section 53, on which the arguments have mainly turned. Every owner or occupier of any dwelling-house when he has laid such communication pipes as aforesaid, and paid or tendered the water-rate payable in respect thereof, is entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes.

Here again the striking of a regular water-rate is contemplated; and, where such water-rate exists, it must be paid or tendered

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before the occupier becomes entitled. But where no water-rate exists, and where no agreement has been made, payment or tender of what is not capable of ascertainment is impossible. The defendants cannot insist on the performance of a condition precedent when they themselves render the condition impossible of performance.

The meaning of these sections when read together is simply this—the sanitary authority must provide a supply of pure and wholesome water. Where they have laid down their main pipes, every occupier of a house is entitled to a sufficient supply for domestic purposes as of right.

The sanitary authority is entitled to make the occupier pay for what he receives. They can do this by striking a water-rate, or by making an agreement; and where there is neither rate nor agreement they can recover the price of what is supplied. But they have no right to withhold the supply or, to do what is the same thing, to constitute themselves judges in their own case by compelling the occupier to agree to any terms they think it right to impose. The section must be construed in a reasonable way, so as not to render futile the dominating purposes of the Act.

But it is said the plaintiff's premises are not rateable, and, therefore, if a water-rate were struck, we should be no nearer the ascertainment of the amount payable. Now, whether it is the duty of the Commissioners of Valuation to value exempted premises or not, there is no doubt that the Commissioners will, if required, assess the valuation for rating purposes, as if the premises were in the hands of a person not exempt. The Crown can submit to pay the water-rate on this assessment, and all difficulties are at an end.

What is to be done in the present case? The Postmaster-General has not strictly complied with the requirements of the sections, or of the rules and regulations. But it would not be right to refuse a declaration of his rights on this ground.

The relief I am prepared to give is conditional upon a strict compliance with these requirements as to notices, bore and material of the pipe, and all the requirements of the rules and regulations.

Subject to this, I shall declare that the plaintiff is entitled to receive a sufficient supply of water to the premises for domestic purposes, and subject to the payment I am about to mention. If one pipe is not sufficient, he is entitled to have two or more, whatever is required to provide a sufficient supply: *South-West Suburban Water Company* v. *St. Marylebone Union* (1).

As the defendants have not thought right to strike a water-rate, and have failed to come to an agreement under which they can be remunerated for the water they are bound to supply, the ordinary legal implication arises that the recipient must pay for the value of what he has received or is receiving. The usual course would be to refer it to Chambers, to ascertain what is the annual value of the water supplied. I think, however, I have sufficient material before me to enable me to arrive at a figure myself. I am of opinion that £5 per annum would be an ample return for the water supplied. I intend that this assessment shall only hold good till a water-rate is struck, or till a regular agreement is arrived at between these parties; and I shall give liberty to either party to apply as he may be advised.

While I hold the contention of the defendants untenable and unreasonable, it is plain that the works of connexion have not been carried out by the plaintiff in conformity with the statutory provisions and the regulations. I therefore declare that the parties must each abide their own costs of the action.

Solicitor to the Post Office: *E. R. Bate.*
Solicitor for the defendants: *G. F. Corbett.*

D. M. S.

(1) [1904] 2 K. B. 174.

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Jan. 16, 17, 18, 30.

In re NATIONAL INSURANCE ACT, 1911. The case of the OFFICERS of SOUTH DUBLIN UNION.

National Insurance—Officers of poor law union—Employment—Contract of service—National Insurance Act, 1911 (1 & 2 *Geo.* 5, *c.* 55), *section* 1, *sub-sections* (1) (2); *section* 66, *sub-section* 1 (iii); *First Schedule, Part I.* (*a*), *Part II.* (*b*).

Officers of a poor law union are not employed under a contract of service within the meaning of Part I. of the first Schedule of the National Insurance Act, 1911.

Motion.

In this case the question was raised by motion under section 66, sub-sect. 1 (iii), of the National Insurance Act, 1911, whether the employment of certain classes of officers of the South Dublin Poor Law Union was "employment" within the meaning of Part I. of the Act. The application was made at the instance of the Irish Insurance Commissioners.

The classes of employment mentioned in the notice of motion were as follows:—

Class I.—(*a*) Those who are in receipt of a salary of over £160 a year, and are not employed by way of manual labour.

(*b*) Those who are in receipt of a salary of under £160 a year, but who are entitled to allowances which would bring their remuneration to over £160, and who are not employed by way of manual labour.

(*c*) Those whose employment involves part time service only, and the rate of whose remuneration would in the opinion of the Insurance Commissioners, if for whole time service, be over £160 a year, and who are not employed by way of manual labour.

Class II.—Nurse of the workhouse. Matron of the workhouse. Schoolmaster of the workhouse. Schoolmistress of the workhouse. Porter of the workhouse. Trained nurses. Qualified nurses. Wardsmaids. Assistants employed in the workhouse infirmary and hospital.

Class III.—The assistants to the various officers enumerated in Article 4 of the Order of the Local Government Board of July 5th, 1901.

Class IV.—Temporary nurses, wardsmaids, and attendants engaged by the master, under said Article 4.

By the Irish Poor Relief Act, 1838 (1 & 2 Vict. c. 56), s. 27, boards of guardians were authorized to enter into and execute all such contracts connected with the relief of the poor and with the purposes of the Act as should be enjoined or permitted by the orders of the Commissioners, and they were empowered to govern and manage the workhouses of their respective unions and to direct the officers of such unions in the execution of their duties, subject to the orders of the Poor Law Commissioners, now the Local Government Board. By section 31 it was enacted that it should be lawful for the Commissioners by their orders to direct the guardians of any union to appoint such paid officers with such qualifications as the Commissioners should think necessary for superintending, acting, and assisting in the election of guardians, in the collection of rates, in the administration of the relief and management of the destitute poor, and otherwise carrying the provisions of the Act into execution; and the Commissioners were further empowered to define, specify, and direct the execution of the respective duties of such officers or the places or limits within which the same should be performed, and direct the mode of the appointment, and determine the continuance in office or dismissal of such officers. By section 32 the salaries were made chargeable on, and payable out of, the poor rates, and the guardians were empowered to raise by rate such sums as should be sufficient to pay such salaries. By section 33 the Commissioners were empowered to remove any paid officers. By section 92 it was enacted that the Commissioners might direct the boards of guardians of so many unions as they might think fit to join in making any contract, and that any contract which should be entered into by or on behalf of any union for, or relating to, the maintenance, clothing, lodgment, or relief of the destitute poor, or for any other purpose relating to or connected with the general management of the destitute poor, or the execution of the Act, which should not be made and entered into in conformity with the orders of the

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In re NATIONAL INSURANCE ACT, 1911 (OFFICERS OF STH. DUBLIN UNION).

Commissioners or otherwise sanctioned by them, should be null and void.

The Order of the Local Government Board, Ireland, of December 18th, 1882, as amended by the Order of July 5th, 1901, regulates the meetings and proceedings of boards of guardians in Ireland, and the appointment and duties of union officers. Article 10 provides that every question at any meeting of the guardians shall be decided by a majority of the guardians present and voting. In case of an equal number of votes on any question, it should be deemed lost. No business to be transacted unless at least three guardians are present. Unless a larger number the three must concur to render any act valid. Voting to be open. Articles 15–21 deal with contracts. Article 15 provides that all contracts to be entered into on behalf of the union, relating to the maintenance, clothing, lodging, employment, or relief of the poor, or for any other purpose relating to, or connected with, the general management of the poor, shall be made and entered into by the guardians. Articles 16 and 17 require sealed tenders for goods or materials or work, except in case of small amounts. Article 20 provides that the contracts are to be in such form as the Local Government Board may approve. Article 24 provides that the board of guardians should as soon as might be requisite, and from time to time upon the occurrence of any vacancy, appoint fit persons to perform respectively the duties specified by the rules and regulations of the Local Government Board in force at the time to be the duties of the following officers:—(1) Clerk to the Guardians. (2) Treasurer to the Union. (3) Medical officer of the workhouse. (4) Master of the workhouse. (5) Matron. (6) Porter. (7) Schoolmaster. (8) Schoolmistress; and shall appoint such assistants as the board of guardians, with the consent of the Local Government Board, shall deem necessary for the efficient performance of the duties of the said several officers.

Article 24 was revoked by the Order of July 5th, 1901; and Article 4 (*a*) substituted for it, is as follows:—

"4 (*a*) The board of guardians shall as soon as may be requisite and from time to time hereafter upon the occurrence of any vacancy appoint, subject to our approval, fit persons to

perform respectively the duties specified by our rules and regulations in force at the time to be the duties of the following officers:—

"(1) Clerk to the Guardians. (2) Medical officer of the workhouse. (3) Master of the workhouse. (4) Nurse of the workhouse. (5) Matron of the workhouse. (6) Schoolmaster of the workhouse. (7) Schoolmistress of the workhouse. (8) Porter of the workhouse."

4 (*c*) Prescribes the duties of the Nurse of the workhouse.

"4 (*d*) The board of guardians shall, subject to our approval in each case, appoint such and so many 'Qualified Nurses' to assist the 'Nurse of the workhouse' in the performance of her duties as above mentioned, and generally in the nursing and care of the sick in the workhouse, and also such and so many 'Wardsmaids' and 'Attendants' for the discharge of menial duties in the infirmary and hospital, as we shall from time to time deem necessary.

"4 (*e*) In any case in which under Article 4 (*d*) the appointment of a nurse, wardsmaid, or attendant is required temporarily, owing to the increase in the number of patients, or for any other reason, the board of guardians shall, subject to our approval, stipulate (notwithstanding the provisions of Article 5 hereof as to continuance in office) that any persons whose services are so required temporarily shall hold office for such term and at such remuneration as shall be directed or approved by us.

"4 (*f*) If in any emergency it appears to the medical officer that the employment of one or more temporary nurses or wardsmaids or attendants is requisite for the proper treatment of any patient or patients in the union infirmary or fever hospital, and if he informs the master of the workhouse in writing accordingly, it shall be the duty of the master to engage a fit person or persons to act as such until the next meeting of the guardians, and the guardians shall pay to any person so engaged such remuneration and expenses as we may approve or direct. When communicating with the master, the medical officer shall at the same time report fully in writing the facts of the case to the guardians and to us.

"4 (*g*) The boards of guardians shall appoint such and so

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In re National Insurance Act, 1911 (Officers of Sth. Dublin Union).

many assistants as they, with our consent and approval, shall deem necessary for the efficient performance of the duties of the said several officers other than the Nurse of the workhouse, as hereinbefore provided."

Article 25 of the Order of 1882 prescribes the duties of officers as follows:—The officers so appointed or holding any of the said offices shall respectively perform the duties required of them in such manner as may be prescribed by the General Orders of the Local Government Board in force at the time, or by any Special Order which may be made by the Local Government Board from time to time, affecting any particular union and the officers thereof, and shall discharge all such other duties conformable with the nature of their respective duties, as the board of guardians may lawfully require them to perform.

Mode of Appointment. Article 27.—Every officer or assistant to be appointed under this Order shall be appointed by a majority of the guardians present at any meeting of the board, in the manner directed in Article 10, and every such appointment shall, as soon as the same shall have been made, be reported to the Local Government Board by the clerk to the guardians.

Article 28.—No appointment of any officer or assistant shall be made under this Order, unless notice that such appointment will be made shall have been given and entered on the minutes at one of the two ordinary meetings of the board next preceding the meeting at which the appointment shall be made, and unless an advertisement giving notice of such shall, by direction of the guardians entered on their minutes, have appeared in some public paper, at least seven days before the day on which such appointment shall be made. Provided that this regulation shall not apply to the appointment of any person who may, subject to the approval of the Local Government Board, be employed temporarily to act as an officer or assistant.

Articles 29–34 deal with the qualification of officers.

Articles 35 and 36 deal with the salaries of officers, and provide that the board of guardians shall pay to the officers and assistants appointed to or holding any office or employment under this Order, such salaries or remuneration as the Local Government Board may from time to time direct or approve. Article 37

provides that every person appointed to the office of clerk, master, or matron of the workhouse, and every assistant employed therein in any office of trust, shall give a bond for the due performance of the duties of the office.

Article 39 provides that every officer appointed to or holding any office under the Order shall, subject to the provisions of Article 40 of the Order, continue to hold the same until he die, or resign or be removed by the Local Government Board, and every porter or assistant may be dismissed by the board of guardians without the consent of the Local Government Board, and every such death, or resignation, and every such dismissal, and the grounds thereof, shall be reported to the Local Government Board.

Article 40 deals with the suspension of officers. The board of guardians may, at their discretion, suspend from the discharge of his duties any union officer except the clerk and chaplain, and shall forthwith report such suspension, together with the cause thereof, to the Local Government Board, and if the Local Government Board shall remove such suspension, such officer shall remain and continue to discharge his duties, but if the Local Government Board shall decide not to remove such suspension, the board of guardians may, on being informed of such decision of the Local Government Board, dismiss such officer.

Article 41 provides that if any officer or assistant appointed to or holding any office under the Order be at any time prevented by sickness or accident or other sufficient reason from the performance of his duties, the guardians may appoint a fit person to act as his temporary substitute, and may, subject to the approval of the Local Government Board, pay him a reasonable compensation for his services, and every such appointment shall be reported to the Local Government Board by the clerk to the guardians as soon as the same shall have been made.

Article 42 provides for the appointment of a duly qualified medical practitioner in case the medical officer is temporarily incapacitated from performing his duties.

Article 5 of the Order of 1901 was substituted for Article 39 of the Order of 1882, and deals with the continuance in office and dismissal as follows:—The officers mentioned in Article 4 (*a*)

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hereof, and also any "trained nurse" or "qualified nurse" or "wardsmaid" or "attendant" appointed hereinbefore or hereunder, shall, subject to the provisions of the said Article 4, of Article 40 of the principal Order, and Article 6 of this Order, continue to hold their offices respectively until they die or resign or be removed by us; and every assistant and paid attendant, other than those employed in the workhouse infirmary and hospital, may be dismissed by the board of guardians without our consent, and every such death, resignation, or dismissal shall be reported to us.

Article 7 provides that in case of the appointment of any person in pursuance of Article 4 (*d*) and Article 4 (*e*) of this Order the provisions of Article 28 of the Order of 1882 may be dispensed with by the Local Government Board.

Article 8 provides that the Order is to be construed as one with the Order of 1882.

The position of the officers of the South Dublin Union was described in the affidavit of the clerk to the guardians as follows:—

Of the officers named in Class II of the notice of motion the offices of schoolmaster of the workhouse, and schoolmistress of the workhouse have been abolished in this union, but the assistant schoolmaster and schoolmistress continue to hold office.

The assistants may be divided into three classes:—

(i) Assistants upon the permanent staff of the union.

(ii) Assistants not upon the permanent staff, but who have permanent employment.

(iii) Assistants employed temporarily.

The assistants included in (i) are persons whose appointments have been made in pursuance of Articles 27 and 28 of the general regulations, and received the sanction of the Local Government Board, and are designated officers in the abstract hereinafter referred to. They comprise the clerk's and master's staffs and include the assistant clerks, assistant master, and assistant matron, master's clerks, storekeeper, diet clerk, wardmasters, and wardmistresses, &c., and whose offices have been created by special orders of the Local Government Board, and whose duties have from

time to time been settled by arrangement between the guardians and the Local Government Board when the necessity for the same had arisen. These officers have salaries rising annually to a maximum. Their names, offices, and salaries appear in each half-yearly abstract of union accounts, and when their age, service, and health require it, they become entitled to such superannuation allowance as the guardians may, under the several statutes in that behalf enabling them, fix, with the consent and approval of the Local Government Board, after which their names, offices, and superannuation allowance will appear upon the aforesaid abstract. There is no record whatever to be found where any member of this class has been dismissed summarily by the guardians. All the records show that the guardians suspend members of this class for misbehaviour, and forward to the Local Government Board upon their minutes the name of the suspended assistant or officer together with the nature of the alleged misbehaviour, which is usually inquired into by one of the Local Government Board inspectors; and if the suspension be not removed by the Local Government Board, the guardians may then, and then only, dismiss the offending one.

The assistants included in (ii) are persons who have been elected by the board of guardians after advertisement, but whose appointments have not been sanctioned by the Local Government Board. This class is usually composed of tradesmen whom it has been necessary to have in permanent employment, other than one or two of the same trade who are already included in Class (i). The members of this class are not upon the permanent staff of the union, and are not entitled to a superannuation allowance, unless the Local Government Board, at the request of the guardians, sanction their appointment, immediately upon which the whole time of their employment will count for calculation of their superannuation allowance.

The assistants included in Class (iii) comprise medical doctors, nurses, apothecaries, and temporary assistants generally, whose appointments are for the purpose of replacing the permanent officer who is away on leave or is absent from illness, and whose duties cease when the permanent officer resumes duty.

The power of the guardians to dismiss assistants without the

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consent of the Local Government Board therein referred to has never been regarded as referring to the permanent assistants who are appointed in the same way as the chief officials of the guardians, but only to the temporary assistants, and the reason why the paid assistants and attendants employed in the infirmary and hospital are exempted is, that by the Order of 1901 a change was made in regard to the infirmary and hospital, which were placed under the direct control of medical officers.

The Attorney-General (*Right Hon. Ignatius O'Brien, K.C.*) and *the Solicitor-General* (*Molony, K.C.*) (*Gerald Horan* with them), for the Insurance Commissioners:—

The questions on which the opinion of the Court is desired are important, as they affect the officers, not only of the South Dublin Union, but of every union in Ireland.

These officers may be divided into three classes: (1) The superior officers, whose remuneration exceeds £160 a year. These are put in the notice of motion as Class I (*a*), (*b*), and (*c*). These would include the clerk, master, master's clerk, assistant master, medical doctor, &c. These are clearly outside the Act, as they come within exception (*g*) of the first schedule of the Act, Part II: "Employment otherwise than by way of manual labour, and at a rate of remuneration exceeding in value one hundred and sixty pounds a year, or in cases where such employment involves part time service only, at a rate of remuneration which, in the opinion of the Insurance Commissioners, is equivalent to a rate of remuneration exceeding one hundred and sixty pounds a year for whole time service."

(2) Inferior officers, whose remuneration is under £160 a year, divisible into two classes: (*a*) Those who hold office for life, subject to removal by the Local Government Board, viz., those mentioned in Class II; and (*b*) officers liable to be dismissed by the guardians, viz., those mentioned in Classes III and IV. It is not material whether the right of dismissal is vested in the Local Government Board or in the guardians. It will be seen by reference to the Local Government Board Orders of 1882 and 1901 that the Local Government Board have altered for the better the status of some of the officers, and made them dismissible by the

Board, instead of by the guardians. The question is, Is their employment an employment under a contract of service within the meaning of the first schedule to the Act, Part I (*a*); in other words, does the relation of master and servant exist between the guardians and the officers? The powers of the guardians to appoint officers, and the duties of the officers, are regulated by the Poor Law (Ireland) Act, 1837 (1 & 2 Vict. c. 56), and the Orders of the Local Government Board made thereunder. Section 31 empowered the Commissioners to direct the guardians to appoint such paid officers as the Commissioners should think necessary, and prescribes their duties and salaries and tenure of office. Section 32 makes the salaries of such officers payable out of the rates. Section 33 provides for the removal of paid officers and the appointment of persons in their room. Section 27 of the Poor Relief Act, 1847 (10 Vict. c. 31), provides for the keeping of accounts by the guardians and their officers. The General Order of December 18th, 1882, deals with the meetings of guardians and their proceedings. Articles 15–21 deal with general contracts for purchase connected with the management of the poor. Article 24 provided for the appointment by the guardians of a clerk, treasurer, medical officer, master, matron, porter, schoolmaster, and schoolmistress of the workhouse, and assistants of such officers. This Article was revoked, and Article 4 (*a*) of the Order of July 5th, 1906, substituted, which provided for the appointment of the same officers (except a treasurer, the duties of which are discharged by a bank) and in addition a nurse. Article 25 provides for the discharge by these officers of the duties prescribed by the Board and of such other duties, conformable with the nature of the office, as the guardians may require. Articles 27 and 28 deal with the mode of appointment. Article 34 provides for one month's notice prior to resignation of office; Article 35 for payment of salaries; and Article 37 for security. Article 39 provides that the officers mentioned in Article 24 should hold office for life, subject to removal by the Local Government Board, except in the case of the porter or assistants, who might be dismissed by the guardians without the consent of the Board.

Article 4 (*d*) of the Order of 1901 provides for the appointment by the guardians of "Qualified nurses" to assist the

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"Nurse of the workhouse" and of "Wardsmaids" and "Attendants" for the discharge of menial duties in the infirmary or hospital. Article 5 was substituted for Article 39 of the Order of 1882, and provides that the officers mentioned in 4 (*a*) and any "Trained nurse" or "Qualified nurse" or "Wardsmaid" or "Attendant" appointed thereunder should hold office for life, subject to removal by the Board, and that every assistant or paid attendant, other than those employed in hospital or infirmary, might be dismissed by the guardians without the consent of the Board.

In Doran v. *Waterford Guardians*; *Clements* v. *Same* (1), the porter, assistant master, and the wardmaster of a union workhouse assaulted a woman who was bringing a patient to the union hospital, and also a man who had come to the woman's assistance. Each brought an action for assault against the guardians of the Waterford Union. The Court held that the porter, assistant-master, and wardmaster were the servants of the guardians, and acting within the scope of their authority, and that the guardians were liable. The statement of claim alleged that the defendants assaulted and beat the plaintiff. The defence was a traverse of the acts, and an allegation that the alleged assault was not committed by the servants of the defendants while acting within the scope of their authority. The question left to the jury on that was, whether they assaulted and beat the plaintiff while acting as servants. These cases were tried in March, 1901, and the Local Government Board Order of 1882, which had not then been modified by the Order of July, 1901, was fully considered by the Court. Under Article 39 of it, the porter, as well as the assistant master and wardmaster, could be dismissed by the guardians without the consent of the Local Government Board. Andrews, J., there says:—"Notwithstanding the control vested in the Local Government Board as successors to the Commissioners, I think that it not only was open to the jury to find that Donnelly, Phelan, and Power were, but that they unquestionably were, the servants of the guardians, and that the guardians were their masters, by whom they were appointed and paid, and could be dismissed." Lord O'Brien, L.C.J., and Gibson, J., were of the

(1) 37 I. L. T. R. 158.

same opinion. It appears from the judgment of Gibson, J., that the defendants contended that they were mere agents on behalf of the Local Government Board, and that, as they did not directly sanction the assault, they could not be made responsible for the misconduct of functionaries who were really servants of the Local Government Board. The decision went on the ground that the relation of master and servant existed; there was no authority, express or implied, to forcibly remove the plaintiffs, which would have otherwise made the defendants liable.

Part I of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1 (1), provides that, subject to the provisions of the Act, all persons of the age of sixteen and upwards who are employed within the meaning of this part of the Act shall be insured in manner provided in this part of the Act.

Section 1 (2) provides that the persons employed within the meaning of this part of the Act shall include all persons who are engaged in any of the employments specified in Part I of the First Schedule to the Act, not being employment specified in Part II of that Schedule. The employment which applies to the present case is specified in (*a*) of Part I of the First Schedule. "Employment under any contract of service, written or oral, whether express or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employer." Compare these words, "Employment under any contract of service," with the definition of "Workman" in section 13 of the Workmen's Compensation Act, 1906; "'Workman' means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, or oral or in writing." The words "has entered into" do not occur in the Insurance Act. In Carr on National Insurance, p. 122, the authors say that the omission of the words "has entered into" has the effect of making the employment rather than the contract the primary test, and, excluding cases where the contract is executory, *i.e.* when the employment, though agreed on, has not actually commenced; and they refer to *Whitbread* v. *Arnold* (1).

(1) 99 L. T. (N. S.) 103.

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There the employer was held not liable, as the employment had not commenced. Article 25 of the Order of 1882 clearly shows that the officers to be appointed are to be officers of the guardians, not of the Local Government Board. A public officer may perform his duties under a statutory obligation, and not under a contract of service; but if the officers in *Doran* v. *Waterford Guardians* (1) had been of that character, the guardians would not have been answerable. The fact that in some cases the power of dismissal rests with the Local Government Board does not prevent there being a contract of service between the officers and the guardians, nor should it make any difference whether the officer holds office for life or for a shorter period. A distinction has been taken under the Workmen's Compensation Act, between a contract of service and a contract for services: *Simmons* v. *Heath Laundry Company* (2). There a laundry girl was injured by an accident arising out of the course of her employment. She earned seven shillings a week at the laundry, and she also gave piano lessons to a man's children at his house at three shillings a week. She applied that the latter sum should be taken into consideration in assessing the amount of compensation. The County Court Judge held that as a teacher of music she did not come within the definition of "workman" in the Act, and awarded her seven shillings a week compensation in accordance with paragraph 1 (*c*), proviso (*c*), of the First Schedule to the Workmen's Compensation Act. The Court of Appeal affirmed the decision, holding that the question whether an applicant in any particular case was a workman within the Act was a question of fact, and that there was evidence to support the finding of the County Court Judge. The Master of the Rolls there said that he could not lay down any satisfactory definition of the term "contract of service." He thought that a teacher might be a "workman," but that in the case before him there was a contract for services, not a contract of service. *Murphy* v. *Guardians of Enniscorthy Union* (3) may be relied on to show that there is not a contract of service between the officers here and the guardians. It was there held by the Court of Appeal, reversing the decision of the County Court Judge,

(1) 37 I. L. T. R. 158.
(2) [1910] 1 K. B. 543.
(3) [1908] 2 I. R. 609.

that there was no contract of service between a dispensary doctor and the guardians of his district, within the meaning of section 13 of the Workmen's Compensation Act, 1906, involving liability on the guardians in the event of his accidental injury or death in the discharge of his duties. That case is clearly distinguishable. The doctor was appointed by the dispensary committee pursuant to the Medical Charities Act, 1851 (14 & 15 Vict. c. 68), s. 8. He was independent of the guardians, to whom the right of appointment was transferred by the Local Government Board (Ireland) Act, 1898, and could not be said to have worked under a contract of service with the guardians. He could only be removed by the Local Government Board, on sufficient grounds. It would seem, however, from the observations in *Simmons* v. *Heath Laundry Co.* (1), that he had entered into a contract for services.

The judgment of the Lord Chancellor is short; the note in the Registrar's book contains the following in addition—"Mr. Healy argued that it was a freehold office. FitzGibbon, L.J.—'What evidence is there here of a contract of service?' The Lord Chancellor —'The doctor is designated by the guardians to perform certain statutory duties.' O'Connor, K.C.—'The trade of the guardians is to look after the poor.' Holmes, L.J.—'It is their duty, not their trade. There is no contract of service here at all.' FitzGibbon, L.J.—'Not a master and servant business at all.'"

When the services of a person are required by the guardians to discharge a particular duty, an advertisement is issued, which is an offer by the guardians to appoint a person subject to approval of the Local Government Board. When he is appointed, and the appointment approved by the Local Government Board, he enters upon his duties, and the relation of master and servant exists. If his wages or salary are or is not paid, he could sue the guardians on the contract between them and him. The duties of the menial officers are prescribed by the guardians, who have power to dismiss them. If they are servants of the guardians, so also are the other officers, although the duties of some of them may be prescribed by the Local Government Board, and the power of dismissal vested in that Board.

(1) [1910] 1 K. B. 543.

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Even if there was no authority given to the guardians to appoint officers, they are a corporation constituted to relieve the destitute poor, and they would be entitled to employ persons for that purpose. But they are empowered to appoint officers, and they can only do so by entering into contracts with particular persons. The master is given power in exceptional cases to "engage" persons; that word implies a contract.

Ronan, K.C. (*Dickie* with him), for the officers of the South Dublin Union.

This Act is a taxing Act, as it imposes a contribution on the individual, and, therefore, the words imposing the tax must be clear. It is not only a taxing Act, but one which confers benefits. The officers of the union think that the benefits they receive from the guardians at present exceed those offered by the Act.

The Workmen's Compensation Act, 1906, has been described as a State Insurance Act by Collins, M.R. The definition of "workman" in that Act and the definition of "employment" in this Act are practically the same, so that decisions under the earlier Act are in point: *Murphy* v. *Enniscorthy Guardians* (1) is such a decision. The Attorney-General says that all the employees of the union are within the Act, or none. He dealt chiefly with the principal officers.

[The Master of the Rolls.—It may be that some are within the Act, and others are not. I have to answer the questions put to me by the Commissioners.]

Two Irish cases have been referred to: one is a decision of the King's Bench Division in 1901, *Doran's Case* (2), and the other of the Court of Appeal in 1908, the *Enniscorthy Case* (1). If there is any inconsistency between the two, the latter should be followed. The one was a decision as to the liability of the guardians to an outsider for the acts of their officers. The other was as to the relation between the guardians and an officer of theirs. I first refer to two English decisions. In *Marrow* v. *Flimby* (3), Rigby, L.J., referring to the definition of

(1) [1908] 2 I. R. 609.
(2) 37 I. L. T. R. 158.
(3) [1898] 2 Q. B. at p. 601.

"workman" in the Employers and Workmen Act, 1875, namely, "any person who being a labourer . . . or otherwise engaged in manual labour . . . has entered into, or works under a contract with an employer," says that it contains no reference to control exercised by one person over another, so that it certainly does not affect or include cases in which a person, not an employer, may, by reason of control exercised over a person, not his workman, become liable for injury caused by the negligence of the latter. That is to say, it has nothing to do with the class of cases dealt with by Andrews, J., in *Doran's Case* (1).

In *Smith* v. *General Motor Cab Company* (2), which was an application for compensation by the appellant, to whom the respondents had let out a taxi-cab, for injury received while he was driving the cab; the County Court Judge held that the relation between the parties was that of bailor and bailee, and that there was no contract of service. The House of Lords affirmed the decision. I cite it for the passage in Lord Atkinson's judgment at p. 191; he says: "The decision on this appeal does not in any way touch the question of the liability of the cab proprietor to third parties for the acts of the driver. It may well be that, though the relation between the taxi-cab owner and his driver *inter se* be that of bailor and bailee, the driver may still, *quoad* third parties, be treated as the agent of the proprietor authorized to ply for hire in the streets for reward to the latter; and the proprietor may be thereby rendered liable for those acts, which were within the scope of the latter's authority." That is to say, the question of liability of a man for the act of another does not touch the question whether there is a contract of service.

Doran's Case (1) is therefore no authority on the point, as the only question there really was the liability of guardians to third parties. On the other hand, the *Enniscorthy Case* (3) was a decision that there was evidence of a contract of service. The note in the Registrar's book, which has been read, bears that out. There the doctor had been appointed before the Local Government Act, 1908, which transferred the powers and duties of the dispensary

(1) 37 I. L. T. R. 158.
(2) [1911] A. C. 188.
(3) [1908] 2 I. R. 609.

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committee to the guardians. The Lord Chancellor said that the doctor was designated by the guardians to perform statutory duties. The Attorney-General tried to get out of that case by referring to the difference between a contract for services and a contract of service as stated in *Simmons* v. *Heath Laundry Co.* (1). The regulations as to the duties of the medical officer of the dispensary and those as to the duties of the medical officer of the workhouse are practically the same.

The duties of officers are not fixed by the guardians, but by the regulations of the Local Government Board under statutory authority. They are public officials, appointed under a statutory authority, to perform duties regulated by statutory powers vested in a third party, the Local Government Board. *Brennan* v. *Limerick Guardians* (2) was an action for negligent treatment of a patient in the workhouse hospital. It was held that there was no duty to provide proper attendance to watch over the plaintiff's son, but only a duty to select and appoint such staff of paid attendants as the Commissioners should by their order direct. In *Dunbar* v. *Ardee Guardians* (3) it was held by the Court of Appeal, affirming the decision of the Exchequer Division, that an action did not lie against the guardians for the negligence of the officials in the hospital by which the death of a patient was accelerated. FitzGibbon, L.J., delivered the judgment of the Court reviewing the authorities, and approving of the decision in *Brennan's Case* (2), decided eighteen years before. These cases were followed by the Court of Appeal in England in *Tozeland* v. *Guardians of West Ham Union* (4). It was there held that the setting of paupers to work was part of the administrative duties imposed upon the guardians by statute, and that an action by the pauper against the guardians for negligence of their officers in discharge of their duties would not lie. This case was referred to and held distinguishable in *Ching* v. *Surrey County Council* (5). There the yard of a school was kept in a dangerous state, and the plaintiff, a pupil of the school, fell while playing in the playground through his foot being caught in a hole in the asphalt

(1) [1910] 1 K. B. 543.
(2) 2 L. R. Ir. 42.
(3) [1897] 2 I. R. 77.
(4) [1907] 1 K. B. 920.
(5) [1910] 1. K. B. 736.

pavement, and was injured. It was held by the Court of Appeal that the action was maintainable on the ground that by the Education Act, 1902, a statutory duty of keeping the school premises in repair was imposed upon the defendants.

The Orders of the Local Government Board of 1882 and 1901 prescribe the officers to be appointed by the guardians, and their duties, but the effect is not to make them servants of the guardians, but only officers to carry out prescribed duties. The directions in Article 25 of the Order of 1882 that they "are to discharge such other duties conformable with the nature of their office as the guardians may lawfully require them to perform," only mean duties consequential on the prescribed duties. A contract of service is not to be implied from the use in Article 4 of such words as "menial" (4 *d*), "stipulate" (4 *e*), or "engage" (4 *f*). The persons appointed under (*d*), (*e*), (*f*), and (*g*) of Article 4 have to look to the Local Government Board for the amount of their remuneration. As a matter of fact there are no emergency officers such as those mentioned in (*f*).

The English cases cited go far to show that *Doran's Case* (1) would not be followed now, but in any case the decision in the *Enniscorthy Case* (2) on the words of the Workmen's Compensation Act applies, and should be followed.

Serjeant Matheson, *K.C.*, and *Condon*, for the guardians :—

We support the contention of the officers ; there is nothing in the Acts or regulations authorizing the guardians to employ any person, but only to appoint persons to discharge prescribed duties ; no distinction can be taken as to any particular class of officer ; the power given in Article 5 of the Order of 1901 to dismiss assistants without the consent of the Local Government Board does not make any difference in their position as regards the Act, and it appears from the affidavit of the clerk to the guardians that this power has never been exercised except in the case of temporary assistants. The guardians and the master acting under (*e*) and (*f*) of Article 4 only act as the agents of the Local Government Board. There is no contract, express or implied.

(1) 37 I. L. T. R. 158. (2) [1908] 2 I. R. 609.

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The Solicitor-General in reply:—

There is a distinction between the Poor Law Acts and the Medical Charities Act, under which latter the *Enniscorthy Case* (1) was decided. The medical officer of the dispensary was appointed by the committee of management, and if they made default in appointing him, the Commissioners could appoint. He was appointed to carry out the provisions of the Act (14 & 15 Vict. c. 28, sect. 8). In the case of the poor law officers, there is an advertisement for the office, an application, an election, and an approval by the Local Government Board. The advertisement is an offer of the appointment, which is accepted by the person elected.

There is an express contract, not an implied one. It is not open to an officer to say that he is not employed by the guardians, nor under any contract with them. The need for the approval of the Local Government Board does not make him the less the servant of the guardians. In *M'Mahon* v. *Carroll*, reported only in Brett's Grand Jury Law, p. 32, Palles, C.B., held that a county surveyor, though appointed by the Lord Lieutenant, was the officer of the grand jury.

There are two reported decisions in England under the Act. (*a*) *In re National Insurance Act* (2). Parker, J., there held that the position of a curate in the Church of England was that of a person who holds an ecclesiastical office, and not that of a person whose duties and rights are defined by the Act. (*b*) *Re Employment of Ministers of Methodist Church* (3). Joyce, J., there held that ministers appointed by the Conference of the Methodist Church were not employed under a contract of service.

The definition of employment in the First Schedule to the Act is very general—"Employment under any contract of service." Exception (*b*) in Part II, "Employment under the Crown, or any local or public authority," where the terms are such as to secure provisions as favourable as those conferred by the Act, shows that otherwise the employees of a local authority would come within the definition. That a board of guardians is a public authority is

(1) [1908] 2 I. R. 609.
(2) [1912] 2 Ch. 563.
(3) 28 Times L. R. 539.

shown by the observations of Lord Gorell in *The Johannesburg* (1), referring to *Sharpington* v. *Fulham Guardians* (2). In *Austin* v. *Bethnal Green Guardians* (3) it was held that the engagement of a clerk to the master of the workhouse by the guardians must, in order to bind the guardians, be under seal. That was an action for wrongful dismissal, and the approval of the Local Government Board of the appointment was necessary. The Court must have considered that there was a contract. In *Adams* v. *Ford* (4) a registration case, arising under the service franchise conferred by section 3 of the Representation of the People Act, 1884, it was held that an industrial trainer in the employment of the guardians, who was given a bedroom and sittingroom in the workhouse, was an inhabitant occupier by virtue of his employment. There is, in cases like the present, an offer by the State of employment on certain terms. If that offer is accepted, there is a contract: see *Carlill* v. *Carbolic Smoke Ball Co.* (5). There is a contract between a civil servant and the Crown, which can be enforced by petition of right.

In *Murphy's Case* (6) the Lord Chancellor says that the doctor was designated by the guardians to discharge certain statutory duties. That may be explained by the fact that the Medical Charities Act directs the appointment of a medical officer; under the Poor Law Acts the power is to appoint such officers as the Local Government Board think necessary. There was no new law laid down in *Simmons* v. *Laundry Co.* (7): see *Grainger* v. *Aynsley* (8), there cited. *Tozeland's Case* (9) and the two Irish cases there approved of are not in point here.

Wylie, for the Local Government Board (10):—

There are two possible views of the position of the officers here—(1) That there is no contract of service, because the Local Govern-

(1) [1907] P. 79.
(2) [1904] 2 Ch. 449.
(3) L. R. 9 C. P. 91.
(4) 16 Q. B. D. 269.
(5) [1893] 1 Q. B. at p. 262.
(6) [1908] 2 I. R. 609.
(7) [1910] 1 K. B. 543.
(8) 6 Q. B. D. 182.
(9) [1907] 1 K. B. 920.
(10) During the argument the Master of the Rolls directed notice of the application to be served on the Local Government Board, and *Wylie* appeared on the second day of the hearing on their behalf.—REP.

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ment Board prescribes the appointment and the duties, and has the power of dismissal, except in the case of the assistants; (2) That there is a contract of service created by the acceptance of the offer of the guardians of an appointment on certain statutory terms, which they are authorized by the Local Government Board to make. In that view it is just like the case of an individual advertising for a servant on certain terms, which the servant accepts by entering his employment (1 & 2 Vict. c. 56, section 31). The words of the Act are very wide—"Employment under any contract of service, written or oral, express or implied." Exception (*a*) was put in because the draftsman thought that there was a contract between a soldier and the Crown.

Ronan, K.C. (with reference to the argument of the Solicitor-General):—

In *Austin* v. *Guardians of Bethnal Green* (1) it was admitted that there was a contract; the only question was, whether it should have been under seal.

As regards the exceptions in Part II of the First Schedule, they cannot enlarge the meaning of Part I. If cases in which there is no contract of service have been included in Part II, you cannot for that reason strike out the words, "contract of service" in Part I. There are some authorities which bear upon this point, and show that a proviso cannot be held to control a substantive enactment: *West Derby Union* v. *Metropolitan Life Assurance Company* (2). The question there was as to the construction of section 2 of the Poor Law Loans Act of 1871, which enacted that if guardians could obtain a loan at a lower rate of interest than that secured by a charge previously made by them, they might obtain an order from the Local Government Board to redeem the balance of the loan, "provided that, in the event of any loan outstanding at the time of the passing of this Act, no such redemption shall take place without the consent of the person or persons to whom the loan shall be owing." It was argued that the proviso showed that the Legislature contemplated that the loans could be paid off, but for the proviso,

(1) L. R. 9 C. P. 91. (2) [1897] 1 Ch. 335; [1897] A. C. 647.

against the will of the person who had lent the money, and had in the proviso protected those who had lent the money previous to the passing of the Act. But the House of Lords held that that was not the meaning of the section, and that the proviso could not be held to control the substantive enactment. Lord Herschell points out that a proviso is often inserted in a statute to protect certain persons from the operation of an enactment, which was never intended to apply to them at all. *Smithett* v. *Blythe* (1), decided in 1830, is the case always cited for the proposition that a proviso cannot extend the operative part of an Act. I relied on the *West Derby Case* (2) in *Blennerhassett's Estate* (3), in the House of Lords, and I was stopped when I read the judgments in that case. There the question was whether an appeal lay to the House of Lords from the decision of the Court of Appeal in Ireland, on a question of law arising under the Land Purchase Acts. It was held that no appeal lay, as it could not be implied from the words of the section.

The Solicitor-General.

If the first part is absolutely clear, the proviso cannot import anything into it. But, where it is not clear, the proviso can assist the Court in coming to a decision as to what was in the mind of the Legislature. "Contract of service" is a general phrase which may include service under the Crown. If that is so, then the exception shows that that was the meaning to be given to it. If the Court comes to the conclusion that under no circumstances can the words "contract of service" apply either to contract with local bodies, or service under the Crown, then I admit there is a good deal to be said for Mr. Ronan's contention.

O'CONNOR, M.R. :— Jan. 30.

In this case the Insurance Commissioners have, in pursuance of section 66 (1) (iii) of the National Insurance Act, 1911, submitted to this Court a question, whether certain classes of employment are within the meaning of Part I of the Act. All

(1) 1 B. & Ad. 509. (2) [1897] 1 Ch. 335; [1897] A. C. 647.
(3) [1912] A. C. 281.

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the classes referred to are composed of officers of the South Dublin Poor Law Union appointed under the Poor Relief (Ir.) Acts. They are divided for the purpose of the question into four distinct classes, but for the present I shall not take notice of this division, because there is one general question which affects them all, and which must be decided before any question peculiarly affecting any special class is approached. The question raised is of the highest importance, because it affects not merely the officers of the South Dublin Union, but the officers of all the poor law unions in Ireland. For this reason I thought that the Local Government Board, who had not originally been served with notice of the proceeding, should get the opportunity of appearing by counsel before the arguments closed, and I am glad that I had the advantage of hearing Mr. Wylie on their behalf.

The general question to which I have referred is, whether the employment of officers of poor law unions is employment under a contract of service, and so brought within the 1st schedule, Part I (*a*), of the National Insurance Act, 1911.

For the solution of this question it will be necessary to determine with precision the status of poor law officers, and this can only be done by a close examination of the Irish Poor Relief Act, 1838 (1 & 2 Vict. c. 56), so far as it relates to the appointment of officers, the duties they have to perform, and the powers of poor law guardians to enter into contracts.

By the Irish Poor Relief Act, 1838 (1 & 2 Vict. c. 56), it was enacted that the Poor Law Commissioners, now represented by the Local Government Board, should be the Commissioners to carry the Act into execution (section 1). It enabled them to form unions for the relief of the destitute poor (section 19), and it provided for the election of a board of guardians for each union, such board to be a body politic and corporate, capable of suing and being sued, and taking and holding goods and chattels (section 27).

By section 27 boards of guardians were authorized to enter into and execute all such contracts connected with the relief of the destitute poor, and with the purposes of the Act, as should be enjoined or permitted by the orders of the Commissioners, and they were empowered to govern and manage the workhouses of their respective unions, and to direct the officers of such unions in

the execution of their duties subject to the orders of the Commissioners. It thus appears that although the direct management of the affairs of such union was entrusted to the board of guardians, the supreme authority was still left to the Commissioners, to whom the execution of the Act was entrusted.

The preservation of the authority of the Commissioners was further provided for.

By section 31 it was enacted that it should be lawful for the Commissioners, as, and when they should see fit, by their orders to direct the guardians of any union, or of so many unions as the Commissioners might in such order specify and declare to be united for the purposes of appointing and paying officers, to appoint such paid officers, with such qualifications as the Commissioners should think necessary, for superintending, acting, and assisting in the election of guardians, in the collection of rates, in the administration of the relief and management of the destitute poor, and otherwise carrying the provisions of the Act into execution, and the Commissioners were further empowered to define, specify, and direct the execution of the respective duties of such officers or the places or limits within which same should be performed, and direct the mode of appointment and determine the continuance in office or dismissal of such officers, and to regulate the salaries payable to such officers, and the proportions in which such respective unions should contribute to such payment. By section 32 the salaries were made chargeable on and payable out of the poor rates, and the guardians were empowered and required to raise by rate such sums as should be sufficient to pay such salaries, and by section 33 the Commissioners were empowered to remove any paid officers.

Now, pausing here for a moment, it may be observed that there is nothing in the group of sections to which I have just referred that suggests the usual relationship of master and servant between the paid officers of the union and the board of guardians. The number of officers to be appointed, the nature of their duties, their tenure of office, their salaries, were not to be fixed by the board of guardians, but by the Commissioners. Further, it was contemplated by the Act that a paid officer might be the officer not merely of one union, but of several. All this seems to be

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directly opposed to the idea of the usual relationship of master and servant. Further, there is nothing to suggest a contract between the board of guardians and their officers, not even a contract for the payment of salaries. It is to be noted that the salaries were not made payable by the guardians so as to suggest a contractual liability, but they were made chargeable on and payable out of the rates, and the guardians were empowered and required to raise by rate sums sufficient to pay the salaries. This probably gives a poor law officer a right of action for the recovery of his salary as a statutable debt, but not a debt created by contract.

So far then I cannot find in the power vested in the board of guardians to appoint officers any power to enter into a contract with such officers.

But just as the Act is most precise in conferring on boards of guardians the power to appoint officers under the direction of the Poor Law Commissioners, so too, is it precise in defining the powers of entering into contracts. By section 92 it was enacted that the Commissioners might direct the boards of guardians of so many unions as they might think fit to join in making any contract, and that any contract which should be entered into by or on behalf of any unions for or relating to the maintenance, clothing, lodging, employment, or relief of the destitute poor, or for any other purposes relating to or connected with the general management of the destitute poor, or the execution of the Act, which should not be made and entered into in conformity with the orders of the Commissioners, or otherwise sanctioned by them, should be null and void.

Now here the classes of contract which the guardians were empowered to enter into were enumerated, and it is, to say the least, most unlikely that if the framers of the Act contemplated contracts by boards of guardians for the employment of officers, no specific mention should be made of any such contract. I would infer from this alone that it was intended that the relation between a board and its officers was not to be based upon contract. But the matter is made still clearer by a further consideration. There was given no power at all to contract, except under the order of the Commissioners; and the General Order of the Local Government

Board, which regulates contracts, deals with them in such a way as to demonstrate that the contracts authorized had no relation to the appointments of officers. The General Order referred to is dated 18th December, 1882. Articles 15 to 21 govern contracts. They prescribe "tenders" for the execution of contracts—a phrase entirely inapplicable to the case of the appointment of an officer.

I would, therefore, on an independent examination of the Irish Poor Relief Act, be prepared to hold that it did not contemplate a contractual relationship between boards of guardians and their officers; but the case is a highly important one, and I deem it right to go through the decisions bearing on the question.

The administration of poor relief in England is governed by a code in its main features similar to the Irish Poor Relief Acts, so that English decisions may with advantage be referred to.

I have been fortunate in finding an early authority which seems to me to be directly in point—*Smart* v. *The West Ham Union* (1). That was an action brought by a collector of poor rate against the guardians who had appointed him for work and labour. He was entitled to remuneration by a poundage on the amounts collected out of each parish comprised in the union, and this poundage he was entitled to deduct out of his collection. He did not do so, and he brought an action against the guardians, based on the ground that there was a liability on them arising out of the appointment. Plaintiff's counsel argued that the appointment implied a contract. Baron Parke, in giving judgment, said (p. 874)—"I am of opinion that under the circumstances the action cannot be maintained. In the first place, there is no contract under seal. The only contract is the appointment; and if the liability of the defendants depended upon the construction of that instrument, it would have been sufficient to say that it ought to have had a seal." Then he goes on to discuss the question whether the appointment was a valid one, and he says that, even if it was, the Act of Parliament did not make the guardians liable for the salary.

(1) 10 Ex. 867.

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Now, it may be thought that the meaning of Baron Parke's judgment was, that he treated the appointment as implying a contract of some kind, but not one for the payment of salary. But I do not think that he meant this. He only adopted counsel's argument that there was an implied contract in order to show that, even on the assumption that there was a contract, the argument failed because the contract was not under seal. The meaning of his judgment was that the liability, if any, was a statutory, not a contractual, liability, and that there was no liability at all, because the statute did not impose it on the guardians. However, the matter is made quite clear by the judgments in the Exchequer Chamber, to which an appeal was brought. The report of the appeal is in 11 Exch. 867. Coleridge, J., said (p. 869)—

"We are all of opinion that this case was rightly decided in the Court below. The question is, whether there is any contract by virtue of which the guardians are liable to pay the plaintiff. The onus of establishing that is cast on the plaintiff. It appears that the guardians were directed by the Poor Law Commissioners to appoint a collector of poor rates. The guardians appointed the plaintiff, who was to be paid by a poundage on the sums collected, and his appointment was sanctioned by the Poor Law Commissioners at the poundage proposed. The plaintiff acted as collector. Then, do these circumstances afford any evidence of a contract between the parties? It is argued that the guardians are liable by mere force of the appointment. But it would lead to dangerous consequences if every person who by virtue of an office which he filled was directed to appoint another person to an office with a salary was liable to pay that salary. The doctrine as to implied contracts cannot be carried to that extent."

Cresswell, J., says (p. 870)—"There is no reason for holding that a transaction is a contract which is not a contract."

I think that this case is an authority for the proposition that a contractual relationship is not to be implied from an appointment to an office under statutable authority.

But, although this is so, it would appear that under special circumstances a poor law officer may have a right of action against

a Board of Guardians for services rendered under an implied contract to pay for them. There is an example of this in *McCarthy* v. *The Guardians of the South Dublin Union* (1). The plaintiff was the medical officer of the poor law union. There was a very severe epidemic of cholera. The plaintiff at the defendants' request rendered extra services which did not come within the scope of his ordinary duties. It was held that he was entitled to recover on a *quantum meruit*, the services having been in fact rendered and accepted. The liability here arose under an implied contract to pay for what was in fact done and performed. But this by no means decided that an appointment of a poor law officer implies a contract, and reference to the judgment of O'Brien, J., at p. 110, will show that he understood the judgment of Parke, B., in *Smart* v. *The West Ham Union* (2), as meaning that liability for salary proceeding from an appointment of an officer under a statute would be a statutory liability, if any, and that if an action lay for its recovery it would be an action on the clause in the Act creating the liability.

I, therefore, am of opinion, that it is clearly established that an appointment under authority of an Act of Parliament to an office does not imply a contract between the body making the appointment and the person appointed. But we have the judgment of the Court of Appeal in Ireland, directly in point. In *Murphy* v. *The Guardians of the Enniscorthy Union* (3), a claim was made by the widow of a Dr. Murphy against the guardians for compensation under the Workmen's Compensation Act, 1906, in consequence of a fatal accident which he met with in the discharge of his duties as a dispensary medical officer of the guardians. By that Act a workman is defined to be "any person who has entered into, or works under, a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing." The claim was allowed in the County Court, the Judge holding that there was a contract of service. The guardians appealed to the Court

(1) I. R. 2 C. L. 97.
(2) 10 Ex. 867.
(3) [1908] 2 I. R. 609.

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of Appeal, and the appeal was allowed. The judgment of the Court was given by Walker, C. It is very shortly reported, but it is very clearly shown that it was the unanimous opinion of the Court that there was no contract of service between the dispensary doctor and the guardians. In addition to the report there was available a note made by Mr. de Versan, the learned Registrar of the Court of Appeal, which is most valuable, because it not merely confirms the published report so far as it shows that the Lord Chancellor, and FitzGibbon and Holmes, L.JJ., held that there was no contract of service, but it contains the affirmative statement of the Lord Chancellor as to the status of medical officers. During the argument, counsel for the claimant pressed the Court with the finding of the County Court Judge, that there was a contract of service. FitzGibbon, L.J., asked—"Where was the evidence of a contract of service?" The Lord Chancellor then said—"The doctor is designated by the guardians to perform certain statutable duties." Holmes, L.J., followed by the observation—"There is no contract of service." These interlocutory observations meant that, in the view of the Court, the doctor held a statutable office which entailed certain statutable duties, and that there was no contractual relationship between him and the guardians.

The medical officer of a dispensary district is just as much an officer of the union as any other. The mode of appointment is similar to that of other officers, and his salary is paid by the guardians. If his appointment does not involve a contract, neither do those of the other officers of the union.

The decisions I have referred to seem to me to dispose of the general question—whether officers of poor law unions are employed under contracts of service; but I was pressed very strongly by the Attorney-General and Solicitor-General with a decision of the King's Bench Division in Ireland, which they insisted was an authority for the proposition that union officers are servants of boards of guardians under contracts of service. If this was the decision, it must be taken to have been over-ruled by the Court of Appeal in Ireland in *Murphy* v. *The Guardians of the Enniscorthy Union* (1); and as I am bound by the authority

(1) [1908] 2 I. R. 609.

of the higher tribunal, I might avoid any further reference to the case in the King's Bench Division. It is right, however, that I should deal with it, as it was strongly relied upon.

The decision referred to is to be found in *Doran* v. *Guardians of the Waterford Union* and *Clements* v. *Same* (1). These were actions brought against the guardians for assaults committed on the plaintiffs by the porter, assistant master, and wardmaster, of the union workhouse. It was held that the guardians were liable, inasmuch as the officers named were their servants acting within the scope of their authority. Andrews, J., and Gibson, J., delivered judgments in which O'Brien, L.C.J., concurred. I cannot, however, find anything in either judgment to the effect that there was a contract of service between the guardians and their officers. The judgments were rather based on a service imposed upon the officers by statute, and an authority over them vested in the guardians by the same statute. Mr. Justice Andrews in his judgment pointed to the 27th section of 1 & 2 Vict. c. 56, which empowered the board of guardians to govern and manage the workhouse, and to direct the officers of the union in the execution of their duties. It was this which created the relationship of master and servant in a sense sufficient to make the guardians liable to third parties for tort committed within the scope of their business. I do not think that the learned Judges had it at all within their contemplation that there was a contract of service. If the decision was based upon the existence of a contract, it cannot now be held to be law in view of the judgment of the Court of Appeal in the *Enniscorthy Case* (2).

I was referred by Mr. Ronan, counsel for the employees of the South Dublin Union, to *Dunbar* v. *Guardians of the Ardee Union* (3). That was an action brought by the mother of a pauper, under Lord Campbell's Act, against the guardians for the death of the pauper, which was alleged to have been caused by the negligence of the master of the workhouse in not providing sufficient attendance while the pauper was ill. The question in the case turned on the right of a [illegible] to bring any action against guardians for neglect of [illegible] so that the decision is

(1) 37 I. L. T. R. 158.
(2) [1908] 2 I. R. 609.
(3) [1897] 2 I. R. 76.

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not directly in point. But FitzGibbon, L.J., who gave the judgment of the Court, made some observations on the status of poor law officers, which are very pertinent to the present case. At page 85 he said—"The general result of these sections [meaning the sections of the Irish Poor Relief Act relating to the appointment of officers and the discharge of their duties] is to show that the ministerial work of poor law relief is entrusted to officers whose status is recognized as to some degree independent of the guardians, and who are rather parts of the system controlled by the Commissioners, than servants or agents of the guardians discharging duties which primarily fall on the guardians themselves." This description is certainly inconsistent with a contract of service between the guardians and their officers.

The judgment of FitzGibbon, L.J., has been approved and adopted by the Court of Appeal in England, in *Tozeland* v. *The West Ham Union* (1). That, too, was an action brought by a pauper, but the judgments bear intimately on the question before us. I need only refer to the judgment of Farwell, L.J., at p. 933, where he says—"Whatever may be the rights of third persons against guardians, the relation of the Local Government Board, the guardians and their officers, and the paupers to one another, is regulated by statute in such a manner that the ordinary considerations arising out of the relation of master and servant have no application."

There is therefore abundant authority against the contention that there is a contract of service between boards of guardians and their officers; and I am clearly of opinion that such officers do not come within Part I of the National Insurance Act, 1911, not being employed under any contract of service.

I will now proceed to answer the specific questions which have been put to the Court.

The first question relates to employees who have salaries of over £160 a year, or salaries which, with emoluments, bring their remuneration over £160 a year, and part-time employees, the rate of whose remuneration would in the opinion of the Court bring the salaries to more than £160 a year, if employed for the

(1) [1907] 1 K. B. 920.

whole year. The answer to this is, that this class does not come within Part I of the Act. All parties admitted that this is so, quite independently of the question whether there is a contract of service.

The second class comprises—the nurse, the matron, the schoolmaster, the schoolmistress and the porter of the workhouse, also the trained nurses, the qualified nurses, the wardsmaids, and attendants in the infirmary or hospital. All of these are officers of the union appointed under the authority of statute and the Order of the Local Government Board, dated 5th July, 1901. My answer as to these is, that they do not come within Part I of the Insurance Act, as they do not hold their office under contracts of service.

Class III comprises the assistants to the officers already mentioned. They are appointed under the same authority; and my answer is the same, for the same reason.

Class IV comprises temporary nurses, wardsmaids, and attendants engaged by the master under Article 4 (*f*) of the Local Government Board Order.

I had some difficulty in arriving at the same conclusion as to this class, because the master is empowered by the Order to engage fit persons to act as temporary nurses, wardsmaids, and attendants, and the guardians are directed to pay them such salaries as the Local Government Board may approve. Here the use of the word "engage" suggests a contract, and this created my difficulty; but still these parties are officers, just as the permanent officers, and the guardians are not entitled to fix their salaries. I do not think that there is enough to differentiate this class from the others, and I must also say that this class does not come within Part I.

Solicitor for the Insurance Commissioners: *J. F. Culhane.*
Solicitor for the S. D. U. Guardians: *Gerald Fitzgerald.*
Solicitors for the S. D. U. Officers: *R. Greene & Sons.*
Solicitors for the Local Government Board: *T. T. Mecredy & Sons.*

W. L.

M. R.
1913.

Jan. 27,
Mar. 31.

In re GAVACAN, Deceased; O'MEARA *v.* THE ATTORNEY-GENERAL.

Will—Construction—Legacy—Charity—Male religious Order bound by monastic vows—"Regular Clergy."

When trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable, the trust does not fail, and in default of apportionment by the trustees, the Court will divide the fund equally between the objects charitable and non-charitable.

A testator appointed his executor to distribute his estate of whatever nature "among the charities and hospitals (Roman Catholic) and the regular clergy—the friars of C. and W. to get the preference."

Held, that this was a gift to three objects—(*a*) charities generally, (*b*) hospitals, and (*c*) the regular clergy, and that, the executor having made no apportionment, the general estate should be divided equally between the three, the first and second being valid charitable legacies, and the third failing as being against the policy of the 10 Geo. 4, c. 7.

Salusbury v. *Denton* (3 K. & J. 529) applied.

Semble, the description "regular clergy" does not by itself necessarily import clergy bound by monastic vows.

Question arising in an administration suit. Simon Cullen Gavacan, the deceased, made his will in the following terms:—"I appoint Mr. Cartan O'Meara, my executor, to distribute my estate of whatever nature among the charities and hospitals (Roman Catholic) and the regular clergy, the friars of Clarendon Street and Whitefriar Street to get the preference, but all must be in the city of Dublin, excepting one hundred pounds to Mrs. Douglas, *née* May Lambkin . . .; ten pounds to the Rev. Mr. Cox, Holy Trinity Church, Brook Green, for masses for the repose of my dear wife's soul, Mary Josephine Gavacan; ten pounds to the Rev. Mother, St. Vincent's, Queen Street, Hammersmith." The following words were written in the margin:—"For masses for my wife's soul and my soul." Upon the further consideration of the administration proceedings, the Court being of opinion that it was open to argument whether or not the charitable bequest of the

residue of the testator's estate was or was not void for uncertainty, directed that Thomas Gavacan, a brother and one of the persons who would be a next-of-kin of said testator in the event of his having died intestate, be added as a defendant, and appointed to argue, as representing the class of said next-of-kin, the question regarding the validity or otherwise of the said charitable residuary bequest. The executor had made no apportionment.

Edward FitzGerald, for the executor:—

The case would appear to be governed by *Salusbury* v. *Denton* (1).

Gerald Horan, for the Attorney-General:—

The natural and reasonable construction is that the words in the margin "for masses for my wife's soul and my soul" are to be read with the bequest to the regular clergy, and not with the bequest to the charities or hospitals. This construction will validate the bequest to the regular clergy. Although the bequest to the regular clergy may be void, it does not follow that the bequest to the charities and hospitals is incapable of taking effect: *Salusbury* v. *Denton* (1). The executor has not an absolute discretion of distribution under the terms of the will, and a scheme should be settled by the Court.

T. S. M'Cann, K.C., for Thomas Gavacan:—

There is an imperative trust, and none of the objects can be entirely excluded. The gift to the regular clergy is void under the policy of the Catholic Relief Act. The intention in favour of the other charitable objects fails for uncertainty.

O'CONNOR, M.R.:— Mar. 31.

In this case a question arises upon the will of the testator, Simon Cullen Gavacan, probate of which was granted to the plaintiff, Michael Cartan O'Meara, on the 7th February, 1912.

As the matter was originally constituted the Attorney-General was the sole defendant, the general estate of the testator having

(1) 3 K. & J. 529.

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O'MEARA v. ATTY.-GEN.

been bequeathed for charitable purposes, but by leave of the Court Thomas Gavacan, a next-of-kin of the testator, was added as a defendant to represent his class, doubt having been thrown upon the validity of the bequest.

The will is a very short one. The material part of it is as follows :—" I . . . appoint Mr. M. Cartan O'Meara, my executor, to distribute my estate, of whatever nature, among the charities and hospitals (Roman Catholic) and the regular clergy, the friars of Clarendon Street and Whitefriar Street to get the preference, but all must be in the city of Dublin." He then gave three small pecuniary legacies.

It was argued on behalf of the next-of-kin that the general bequest was void for uncertainty, as it is impossible to say how much the testator intended for charities and hospitals, and how much for the regular clergy, who are not the objects of a legal charity. It was sought to bring the case within the established principle that when a bequest is made for charitable purposes and also for non-charitable purposes, which on account of indefiniteness, or for some other reason, cannot be carried out, and no apportionment is made by the will between the charitable and non-charitable objects, so that the whole might, under the terms of the will, be applied for either purpose, the whole bequest is void. I was referred to the well-known case of *Morice* v. *The Bishop of Durham* (1) and *Hunter* v. *Attorney-General* (2) in support of this principle, which is, undoubtedly, well established. But does this case come within the principle? In my opinion it does not. The will does not give the executor liberty to apply the estate towards one purpose to the exclusion of the others. It was the testator's intention that his estate should be distributed between the charities and hospitals and the regular clergy. Each was intended to have a share, although the share is not exactly defined. This is the feature of the present case which distinguishes it from the cases above referred to where the objects of the legal charity were not necessarily to get any share.

The present case seems to come rather within the principle of

(1) 9 Ves. 399, 10 Ves. 521. (2) [1899] A. C. 309.

Attorney-General v. *Doyley* (1) and *Salusbury* v. *Denton* (2), referred to in the judgment of Lord Davey in *Hunter* v. *Attorney-General* (3), as deciding that when the trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable the trust does not fail; but in default of apportionment by the trustees, the Court will divide the fund between the objects charitable and non-charitable equally.

In this case the executor was given a power to distribute, which, I think, was only a power to apportion and not a power to exclude. The executor has not himself made the apportionment, and the Court is bound to make an equal distribution in accordance with the authorities above referred to. As I understand the will, there are three objects—(1) charities generally; (2) hospitals (a particular form of charity); and (3) the regular clergy, with a preference for certain friars named. The general estate should, therefore, be divided into three equal parts. Two of these parts should be applied to the charities and the hospitals respectively. The third would be applicable to the regular clergy in Dublin—a class easily ascertainable—if they could legally take a bequest. I am not clear that the description "regular clergy" by itself imports monastic vows, but in this case the testator must have referred to monasteries, as he gave a preference to the friars. I, therefore, hold that the bequest as to the third share is void for illegality, and that it goes to the next-of-kin as in a case of intestacy.

All parties must have their costs out of the assets.

Solicitors for Thomas Gavacan: *Cussen & Kieran.*
Solicitor for the executor: *Michael J. Ryan.*
Solicitors for the Attorney-General: *J. L. Scallan & Co.*

A. E. C.

(1) [1735] 4 Vin. Abr. 485, 486, 7 Ves. 58, *note*.
(2) 3 K. & J. 529.
(3) [1899] A. C. 309.

Wylie, J. 1913.

Feb. 20, 21, 25.

IN THE MATTER OF THE ESTATE OF ANNE ALLISON TENNENT.

Estoppel—Invalid exercise of power to appoint by will—Entry of tenant for life under the will—Acquisition by, of statutory title—Position of remainderman.

Where a person enters as tenant for life under a will, which purports to be an exercise of a power to appoint lands, whether rightfully as a proper appointee, or wrongfully under a void appointment, he is not estopped from saying as against the remainderman that the devise over to him is void as being an invalid exercise of the power.

Paine v. *Jones* (L. R. 18 Eq. 320), *In re Stringer's Estate* (6 Ch. D. 1), and *In re Anderson* ([1905] 2 Ch. 70), considered and applied. *Board* v. *Board* (L. R. 9 Q. B. 48) and *Dalton* v. *Fitzgerald* ([1897] 2 Ch. 86) distinguished.

QUESTIONS OF LAW submitted by the Examiner for the decision of the Judicial Commissioner. From the memorandum of the Examiner the following facts appeared :—

By his will, dated the 29th day of September, 1827, William Tennent devised, *inter alia*, the lands of Edenreagh, held under lease for lives renewable for ever, to his trustees upon trust to permit his son, George Tennent, to receive the rents and profits thereof during his life, and at his decease for his heirs lawfully issuing, but on condition that his trustees or his said son should pay to his (George Tennent's) sister Anne Dillon, wife of Richard Dillon, the annual sum of £100 out of the said rents and profits for the support of herself and her children, and at the decease of his son, George Tennent; and, in default of such issue to him as aforesaid, to hold the said lands in trust for Anne Dillon, wife of Richard Dillon, for her life, and at her decease for her children in such manner as she should herself devise by her last will, she and her issue respectively taking and using the surname of Tennent only. Testator appointed his brother, Robert Tennent, his residuary devisee, and died on the 20th day of July, 1832, without having altered or revoked his said will. George Tennent, mentioned in the said will, died prior to 1836 without issue,

and on his death Anne Dillon entered into receipt of the rents and profits of the said lands, taking the surname of Tennent.

Anne Dillon Tennent duly made her will, dated the 26th day of December, 1853, whereby, after reciting, *inter alia*, that she was entitled under the will of her father, William Tennent, to the lands of Edenreagh for the term of her natural life with remainder to her children in such manner as she should devise the same by her last will, she devised the said lands (with other property) to her trustees upon trust to permit her grandson, William Tennent Allison, to receive the rents and profits thereof, during his life, he taking the surname of Tennent only, subject to the payment of a sum of £3,000 to her granddaughter, Anne Tennent Allison, as thereinafter mentioned, and after his decease in trust for his children or grandchildren lawfully begotten, in such shares as he should by deed or will appoint, and in default of appointment for such children equally, and, if only one, for such one; and, in case William Tennent Allison should die without issue, in trust to permit her granddaughter, Anne Tennent Allison, to receive rents and profits thereof during her life, in case she should survive her brother, she taking the surname of Tennent only, and after her decease in trust for her children or grandchildren in such shares as she should by deed or will appoint, and in default of appointment for such children equally, and, if only one, for such one. Then, after providing for the event of Anne Tennent Allison dying in the lifetime of her brother, leaving issue, and for the trusts of the £3,000 charge, and other matters, testatrix continued: "And should the said William Tennent Allison and Anne Tennent Allison die before attaining the age of twenty-one years, or leaving children lawfully begotten, then I leave the said lands of Edenreagh to my husband, Richard Dillon Tennent, and at his death to William Dawson." All the children of Anne Dillon Tennent as well as her husband, Richard Dillon Tennent, predeceased her. One of her children, who married Robert Allison, left two children her surviving, *i.e.* William Tennent Allison and Anne Tennent Allison, mentioned in her will, but it did not appear which child was her last surviving child. Anne Dillon Tennent died on the 6th day of December, 1856, without having altered or revoked her said will.

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On the death of Anne Dillon Tennent, William Tennent Allison went into receipt of the rents and profits of the said lands, having taken the surname of Tennent. William Tennent Allison Tennent died on the 20th day of April, 1863, intestate and unmarried, and letters of administration to his estate were duly granted to his father, Robert Allison. On the death of William Tennent Allison Tennent, Robert Allison and Anne Tennent Allison entered into receipt of the rents and profits of the said lands, both having taken the surname of Tennent. By an indenture, dated the 24th day of April, 1894, Robert Allison Tennent, claiming to have some interest in the said lands, in consideration of natural love and affection, conveyed the said lands to Anne Tennent Allison Tennent. She had remained unmarried, and had now sold the said lands under the Land Purchase Acts.

The following questions were submitted:—

1. Did the vendor enter into possession of the said estate as tenant for life under the will of Anne Dillon Tennent?

2. Had Anne Dillon Tennent under the will of William Tennent power to appoint the said estate to her grand-children?

3. Can the gift in remainder to William Dawson contained in the will of Anne Dillon Tennent take effect in the events that have happened?

4. In case the Court decides that the vendor entered into possession of the said estate as tenant for life under the will of Anne Dillon Tennent, that the successor in title of Robert Tennent is statute-barred, and that the gift in remainder to William Dawson cannot take effect, who is entitled to the remainder expectant upon the determination of the life estate of the vendor?

J. Samuel Edge, for the vendor:—

Apart from the question of whether "and" should be read "or" in the devise over to William Dawson, and of whether the appointment to grandchildren was a valid exercise of the power given to Anne Tennent to appoint to "children," it is clear on the face of her will (*a*) that the devise over to William Dawson is invalid, as he is not an object of the power; and (*b*) that, the power being a

special power, all the limitations over after the life estate given to William Tennent Allison are void as violating the rule against perpetuities. The vendor is not estopped from saying, as against William Dawson, that the gift over to him is invalid on these grounds. It is clear that the vendor's possession is sufficient to bar all persons claiming against the will of William Tennent. The vendor does not dispute the will of Anne William Tennent. She is not estopped, however, from saying that neither she nor William Dawson took anything under it : *Paine* v. *Jones* (1). Even assuming that the vendor wrongfully claimed to have entered as tenant for life under the will, she is not estopped from saying that the devise over to him is invalid, or from setting up a statutory title as against him : *In re Stringer's Estate* (2) ; *In re Anderson* (3).

The principle of estoppel goes to the extent of preventing the vendor from denying the power to appoint, but not from saying that the power was invalidly exercised.

A. H. Bates, K.C., for persons claiming through William Dawson :—

We admit that the vendor's possession is sufficient to bar all persons claiming against the will of William Tennent. It is clear, however, that the vendor claimed to enter as tenant for life under the will of Anne Dillon Tennent, and having so entered she is now estopped from denying the validity of the limitations over. The principle is stated in Carson's Real Property Statutes (4). Where A, who has no title, purports by deed to grant land to B, for life, with remainder over, and B. enters under the deed, and afterwards acquires title by possession against the true owner, B and his privies are estopped as against the remainderman from disputing the validity of the deed : *Dalton* v. *Fitzgerald* (5). The same principle applies where B enters under a devise by a testator who had a defective title : *Board* v. *Board* (6). The authorities relied on by the vendor were all cases where testators were

(1) L. R. 18 Eq. 320.
(2) 6 Ch. D. 1.
(3) [1905] 2 Ch. 70.
(4) Ed. 1910, p. 132.
(5) [1897] 2 Ch. 86.
(6) L. R. 9 Q. B. 48.

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disposing of property which was their own. Here the testatrix was merely purporting to exercise a power of appointment.

S. L. Brown, K.C., and *A. B. Babington*, for mortgagees of the vendor:—

The principle of estoppel as laid down by Sir George Jessel, M.R., in *In re Stringer's Estate* (1) is applicable here. Assuming that the vendor entered as tenant for life under the will, she entered not on the ground that she admitted the title of William Dawson, but on the ground that she claimed as tenant for life. It cannot be said that, because she entered without title, her entry gave a new title to him. She is, no doubt, estopped from denying the power to appoint, but she is not estopped from relying on the defective exercise of the power as against him. Having been in possession since 1863, she has now acquired a statutory title as against him.

Feb. 25.

WYLIE, J.:—

By the will of William Tennent, dated September, 1827, the lands of Edenreagh, sold in this matter, were, in the events that happened, devised in trust for Anne Tennent, wife of Richard Dillon, for her life, and at her decease to her children, in such manner as she should herself devise by her last will, she and her *issue* respectively taking and using the surname of Tennent only.

Now, there are two questions raised as to the effect of that devise. The first question is—Does the word "children" include grand-children? Clearly, without some explanatory or controlling context, it would not, and the only argument used in favour of so extending its meaning was based on the words in this devise "she and her *issue* respectively taking the name of Tennent only." Now, these words are evidently a repetition of the words previously used several times in the will in connexion with the devise of estates tail in other properties, where the word "issue" clearly bears its primary meaning of descendants generally. It is, therefore,

(6) Ch. D. 1.

argued that the word ought to have the same meaning put upon it here, and, if so, that the context shows that testator intended the word "children" in the devise to mean "issue." On the other hand, in an earlier part of practically the same clause in the will, he directs the previous devisee of these lands to pay £100 yearly to Anne Tennent for the support of herself and "her children," and in the subsequent clauses of the will there are many other devises and bequests to other daughters for life, and at their decease to their children in the same way, where the word "children" must have its primary meaning. If, therefore, it became material to decide this question, I do not think the word "children" in this devise could be construed as including grandchildren.

The second question arising here is—Who, in the events that happened, would take the estate on Anne Tennent's death in default of appointment to children? The facts are that all Anne Tennent's children predeceased her, and, therefore, there was not and could not have been any valid appointment to children, the power to appoint being by will only. But one of the children at least left two children, who survived Anne Tennent, one of whom is the vendor in this matter. The rule deducible from the authorities appears to me to be that, if there be a *direct gift to a class* in such manner as A. shall appoint, the property vests in the class until the power is exercised, and they will all take in default of appointment, even though the power is exercisable by will only: see Farwell on Powers (1); *Lambert* v. *Thwaites* (2); *Wilson* v. *Duguid* (3). It follows, therefore, that in this case the property was vested during Anne Tennent's life in the children as joint tenants in remainder, and that, upon the mother's death without making a valid appointment, it would remain vested in the representatives of the last survivor of the children. The only evidence before me as to the children is that they all predeceased their mother, one of them leaving two children, the vendor and her brother, but whether such one was the last survivor does not appear, nor do I think it now material to inquire, having regard to the events which have since happened.

(1) Ed. 1893, p. 472.
(2) L. R. 2 Eq. 151.
(3) 24 Ch. D. 244.

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Anne Tennent died in 1856, having in 1853 made her will. The will recites that she was entitled under the will of her father, William Tennent, to the lands of Edenreagh, for the term of her natural life, with remainder to her children in such manner as she should devise the same by her last will. Now it will be observed that recital truly and accurately sets out testatrix's interest in the lands and the only power she had, being a married woman, of making any valid testamentary disposition of them. She then devises the lands to trustees in trust for her grandson, William Tennent Allison, for life, subject to a charge of £3000 for her granddaughter, Anne Tennent Allison, as thereinafter mentioned, and after his decease to his children or grandchildren lawfully begotten as he should by deed or will appoint, and in default of appointment to such children equally, and, if only one, to such one; and, in case William Tennent Allison should die without issue (which event happened), in trust for her granddaughter, Anne Tennent Allison, for her life, in case she should survive her brother, and after her decease to her children or grandchildren as she should by deed or will appoint, and in default of appointment to her children equally, and, if one only, to such one. Then after providing for the event of Anne Tennent Allison dying in the lifetime of her brother leaving issue, and for the trusts of the £3000 charge, and other matters, there follows this clause:—"And should the said William Tennent Allison and Anne Tennent Allison die before attaining the age of twenty-one years, or leaving children lawfully begotten, then I leave the said lands of Edenreagh to my husband, Richard Dillon Tennent, and at his death to William Dawson."

Now, Mr. Bates, appearing for persons claiming through William Dawson, contends that on the death of Anne Tennent Allison, the vendor, who is now a spinster over seventy years of age, without leaving issue, his clients will become entitled to the lands, or the purchase-money representing them, under this devise over.

The vendor contests this claim on three grounds: first, that William Dawson was not an object of the power, and that, therefore, the devise to him was void; secondly, that, the power being a special power, all the limitations over after the death of

William Tennent Allison, including the devise to William Dawson, are void as violating the rule against perpetuities; and, thirdly, that, the power being a power to appoint to children only, the life estates given to William Tennent Allison and Anne Tennent Allison were void, and that she, the vendor, having been in possession since 1863, has acquired a title by the Statute of Limitations against everyone, including William Dawson, although claiming under the will. Now it is the common case that the vendor's possession is sufficient to bar all persons claiming outside and against the will; but Mr. Bates contends that the vendor entered as tenant for life under the will, and that, having so entered and continued in possession, she is estopped from denying the validity of the limitation either to herself or to the other devisees. In support of this contention Mr. Bates referred to *Board* v. *Board* (1), and *Dalton* v. *Fitzgerald* (2).

In *Board* v. *Board* (1), a testator, being merely tenant by the courtesy of certain premises, devised them to his daughter for life, remainder to his grandson. On testator's death, the daughter entered under the devise, remained in possession for over twenty years, thereby barring the heir-at-law, the true owner, and it was held that she was estopped from denying the title of the remainderman.

In *Dalton* v. *Fitzgerald* (2), where a grantor who had no title purported to convey a piece of land to A. for life, with remainders over, and A. entered upon the land under the deed, and afterwards acquired a good title by possession against the true owner, A. was estopped as against the remainderman from disputing the validity of the deed. These cases seem to me to carry the estoppel to this extent only, that where a settlor who has no title, or only a defective title to property, by will or deed settles that property upon several persons in succession by means of limitations which would be good and valid in law if the settlor had a good title, a limited owner entering under that settlement and acquiring a possessory title against the true owner, acquires it for the benefit of the settlement, and is estopped from denying the settlor's title.

(1) L. R. 9 Q. B. 48. (2) [1897] 2 Ch. 86.

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On the other hand, counsel for the vendor referred me to the cases of *Paine* v. *Jones* (1), *In re Stringer's Estate* (2), and *In re Anderson* (3), in support of his contention that the doctrine of estoppel does not apply to this case. In *Paine* v. *Jones* (1), a testator by a will, which came into operation prior to the Wills Act, devised all his real estate and also all other his estate of which he might be possessed at the time of his death, in trust for his wife for her life, with remainders over. After the date of the will, and before his death, he purchased a freehold estate. On his death the widow entered into possession of the after-acquired property, as well as the devised estate, believing that all the property passed by the will, and continued in possession for over twenty years. It was held she had acquired a good title by adverse possession against the remaindermen. That is, though she would have been estopped from denying the testator's title to the after-acquired property, she was not estopped from saying that, according to the law as it then stood, the will did not legally pass the after-acquired property, and that neither she nor the remaindermen took any title to it under the will.

In *In re Stringer's Estate* (2), T. S., by his will, gave his real estate to his brother J., with certain powers of disposal, then to J. H. for life, with remainders over. The brother died in testator's lifetime, and, on testator's death, J. H. entered as devisee for life and continued in possession for more than the statutory period. Sir George Jessel, M.R., held, first that on the true construction of the will the gift of the real estate to the brother, J., was an absolute gift, and that all the gifts over were void, and that J. H. was not estopped from setting up a statutory title by his having wrongfully claimed to enter as tenant for life. The Master of the Rolls, in giving judgment, after referring to cases of estoppel by contract, says this (4) :—"Another class of cases, of which several instances were referred to, is this. A man is in possession of land with a defective title, but he has possession. . . . He devises to a man for life with remainder over. The devisee, having no title except under the will, enters

(1) L. R. 18 Eq. 320.
(2) 6 Ch. D. 1.
(3) [1905] 2 Ch. 70.
(4) 6 Ch. D. at p. 10.

under the will. It has been held that he cannot deny that the testator had a right to devise in the way he has devised; that is, that the testator had a sufficient title to support the devise as far as the devisee is concerned—not to make the devises valid which were invalid, because the devises were invalid *per se* if the testator had insufficient title. Therefore, the whole of the estoppel is this: You have entered under the will of a man who had possession as far as you are concerned; possession is the fee; you cannot say, you having no title, that he had less than the fee which he purported to devise. You are estopped from denying his title to dispose of that fee, though you may have found out afterwards that he was only tenant for years, or from year to year, or tenant for life, or anything else. You have got possession under that will, and possession in law, as far as you are concerned, of the fee. All that I understand. That is a little extension of the doctrine of estoppel by contract, but it follows on the same principle. But now we come to a suggested third extension, and that is this: A man enters under a will which contains an invalid devise. It is alleged that by claiming under that will and getting possession he affirms the invalid devise. Now, I cannot see the distinction suggested between the case where the remainder is invalid as well as the tenancy for life, and the case where the remainder alone is invalid. If he enters rightfully as tenant for life, and the next remainder is invalid, it is admitted that will not make the remainder valid, because he had only a right to his tenancy for life; but he only claims as tenant for life; he admits throughout that he is tenant for life. . . . He enters, not upon the ground that he admits the title of the remainderman, but upon the ground that he claims as tenant for life. But if he himself enters without title, it is said that because he has no title himself his entry gives a new title to the remainderman. I cannot see it. Suppose the defect in the tenancy for life is a different defect from that of the remainderman: suppose the gift to him was void for remoteness, and the gift to the remainderman was void as being to a charity, or *vice versa*. How can it be said that his entry, though wrongful as tenant for life, estops him from doing anything? Why cannot he set up the defect against the remainderman? Can it make any difference if it

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happens to be the same defect? Why can he not admit the defect, and say, 'I find now I have no claim to the property'? It does not appear to me to be within the doctrine of estoppel at all; neither within the principle of the doctrine, nor within the authorities which establish the doctrine."

I have quoted from this judgment at length, because every word of it seems to me to have a bearing upon the present case, and to show in a clear and forcible way the application of the doctrine of estoppel in such cases. I do not overlook the fact that the judgment of the Master of the Rolls in this case upon the construction of the will was over-ruled, but that reversal did not touch that part of his judgment dealing with estoppel, and indeed that part was, I think, approved of by the Court of Appeal in *Dalton* v. *Fitzgerald* (1), where Lindley, L.J., puts the point of it very neatly thus:—(2) "What he" (the Master of the Rolls) "was objecting to was the extension of the doctrine of estoppel to tenants for life who do not dispute their testators' title, but who do dispute the legal validity of their dispositions of property which was their own."

In re Anderson (3) also throws some light upon this doctrine. A married woman by her will, in the valid exercise of a power, gave the Litchurch property to W. for life, with remainders over. By a codicil she gave her Worksop property (of which she was owner, but being a married woman could not dispose of by will) to W. for life, with similar remainders over. W. entered upon both properties under the will and codicil, and acquired by possession a title to the Worksop property against the heir of the testatrix. It was held that W., by his entry upon the Worksop property as tenant for life under the codicil, was not estopped from saying as against the remainderman that the testamentary disposition of Worksop was invalid.

Now, those three cases, with which I have last dealt, seem to me clearly to apply to the present case. The testatrix here was a married woman, and, even if she had been legal owner in fee, could not, prior to her death in 1856, have made a valid devise of them. Therefore, as you would expect, her will on its face shows her power of disposition. It recites that she is tenant for life

(1) [1897] 2 Ch. 86. (2) *Ibid.* at p. 92. (3) [1905] 2 Ch. 70.

with a special power to devise to her children. She then proceeds (all her children being dead) to give a life estate to her grandson, with limitations over to his children or grandchildren, then, in default, a life estate to her granddaughter, the present vendor, with limitations over to her children or grandchildren, with an ultimate limitation, in case both her grandson and granddaughter should die under twenty-one or without issue, to William Dawson, who was some relative.

Now, it is plain on the face of the will that, apart from the question of the proper construction of the devise over to Dawson, and apart also from the question as to whether the objects of the power included grandchildren, the devise over to William Dawson is invalid, because he is not an object of the power. But it is also clear on the face of the will that, as neither of the grandchildren was alive at the date of the death of William Tennent, under whose will the power was conferred upon his daughter, Anne Tennent, all the limitations in Anne Tennent's will after the life estate of the grandson are void as violating the rule against perpetuities. Therefore, it seems to me, though the vendor entered as tenant for life under the will, as I hold she did, that, whether she entered rightfully as a proper appointee, or wrongfully under a void appointment, she is not estopped from saying, as against William Dawson, that the devise to him was invalid on either of the grounds above mentioned. The invalidity of all these limitations over appears on the face of the will, and, therefore, I do not see how the vendor by entering under the will can on any principle of estoppel be prevented from averring the truth appearing in the will itself.

I, therefore, hold that the vendor, in the events that have happened, became owner in fee of the lands sold, and is absolutely entitled to any residue of purchase-money after payment of all claims upon it.

Solicitors for the vendor: *Wilson & Simms.*

Solicitors for persons claiming under William Dawson: *Hone & Falkiner.*

Solicitors for mortgagees of the vendor: *Bennett Thompson & M'Neill.*

J. E. W.

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In the MATTER of the ESTATE of ROBERT BALL STEELE, Deceased; JOHN TREACY STEELE *v.* ROBERT LAURENCE BALL STEELE and ROBERT MONTGOMERY BALL STEELE.

Landlord and tenant—Land Purchase Acts—Devise of real estate by landlord—Purchase agreements subsequent to devise—Republication of will by codicil—Death of landlord—Subsequent sanction of advance—Conversion—Ademption—Irish Land Act, 1903, *section* 16.

A testator, who was the absolute owner of real estates in Kildare and Dublin, by his will, executed in 1899, devised these estates to R. B. S. for life, with remainder to his first and other sons in tail male, with remainders over, and appointed J. T. S. his residuary legatee. On the 1st of January, 1906, the testator signed purchase-agreements with thirty-one of the thirty-six tenants occupying holdings on his Kildare estate, for the sale to them of their holdings under the Irish Land Act, 1903, and on the 31st January, swore an affidavit verifying an originating application to the Estates Commissioners to have his entire Kildare estate declared fit to be regarded as a separate estate. On the 1st February, 1906, the testator signed purchase-agreements with the five tenants occupying holdings on his Dublin estate. On the 7th February, 1906, the testator executed a codicil to his will, whereby he appointed a new executor, and expressly confirmed his will in other respects. The testator died on the 23rd May, 1906, having in the interval between the execution of the codicil and his death signed further purchase-agreements with three of the five remaining tenants on his Kildare estate. The Estates Commissioners did not sanction the advance of the purchase-moneys for the two estates until after the death of the testator.

Held, by the Court of Appeal (affirming the decision of Barton, J.) that the codicil effected a republication of the will, that the testator intended his interest in the lands devised to pass to R. B. S., and that the latter was entitled to a life estate in the purchase-moneys of the lands contracted to be sold by the testator in his lifetime, with remainders as provided by the will.

Quære, whether, having regard to the provisions of section 16 of the Irish Land Act, 1903, the signing of agreements for sale of lands under that Act can operate as a conversion of lands devised by a will executed by the vendor prior to the date of the agreements, so as to adeem a specific devise?

In re Sherlock's Estate ([1899] 2 I. R. 561, 591) and *In re Doyle's Estate* ([1907] 1 I. R. 204) considered.

ORIGINATING SUMMONS adjourned into Court.

Robert Ball Steele, late of Dublin, executed his last will on the 25th November, 1899, in the following terms: "Whereas I am absolute owner of certain estates situate in the Counties of Kildare and Dublin, I hereby charge my said estates with the following annuities, viz., to my daughter, Anne Treacy Steele, an annuity of £60 for her life, to my daughter, Catherine Treacy M'Cormick, an annuity of £25 for her life, to my son, John Treacy Steele, an annuity of £60 for his life, the said annuities to be paid quarterly on the 1st January, 1st April, 1st July, and 1st October in each year, the first payment to be made on whichever of the said gale days shall happen first after my decease. I direct that the annuities given to my daughters shall be paid to each on her own receipt for her sole and separate use, free from marital control, and without power of anticipation; and, subject to said annuities, I devise my said estates to, and to the use of, my elder son, Robert Ball Steele, for his life, with remainder to his first and other sons in tail male, with remainder in default of such issue male to my younger son, John Treacy Steele, for life, with remainder to his first and other sons in tail male, and failing such to my own right heirs. I bequeath to my daughter, Anne Treacy Steele, all my household goods, furniture, and effects, save my pictures and plate, which pictures and plate I bequeath to my said elder son, Robert Ball Steele. I appoint my son, John Treacy Steele, my residuary devisee and legatee, and I appoint my son-in-law, Arthur J. M'Cormick, executor of this my will."

The testator was absolute owner in fee-simple of the said estates; the Kildare estate comprising thirty-six holdings in the occupation of tenants, and the Dublin estate comprising five holdings in like occupation.

On the 1st January, 1906, the testator signed thirty-one agreements with thirty-one tenants on the Kildare estate for the sale to them of their holdings under the provisions of the Irish Land Act, 1903, and on the 31st January, 1906, he swore an affidavit verifying an originating application to the Estates Commissioners to have his entire Kildare estate declared fit to be regarded as a separate estate for the purposes of a sale.

On the 1st February, 1906, the testator signed agreements

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with the five tenants on his Dublin estate for the sale to them of their holdings under the said Act.

On the 7th February, 1906, the testator executed a codicil to his said will, whereby he revoked the appointment of Arthur J. M'Cormick as executor of his will; and having appointed Robert Ball Steele to be executor in his place, he added the words: "I confirm my said will in other respects."

The testator signed three further purchase-agreements with the remaining tenants on the Kildare estate, two on the 1st March, 1906, and one on the 22nd March, 1906. The testator died on the 23rd May, 1906, and his will was duly proved by the said Robert Ball Steele, who subsequently signed purchase-agreements with the two remaining tenants on the Kildare estate. The purchase-moneys of the Kildare estate amounted to £25,143, and those of the Dublin estate to £3140, and after redemption of superior interests, &c., there remained a residue of £3000. The Estates Commissioners sanctioned the advances subsequently to the death of the testator. The present summons was instituted by the said John Treacy Steele, as residuary legatee under the said will and codicil, for the determination of the questions whether, upon the true construction of the said will and codicil, and in the events which had happened, the said John Treacy Steele, as residuary legatee, was entitled to the purchase-money of such portions of the said Kildare and Dublin estates as the testator had agreed during his lifetime to sell to the occupying tenants thereof, or whether such purchase-moneys were subject to the limitations of the real estate of the said testator contained in the said will; and applying for liberty for the said John Treacy Steele to obtain from the Irish Land Commission an order for the transfer to the credit of this summons of the residue of the said purchase-moneys after the discharge of all claims thereon, and, if necessary, for administration of the real and personal estate of the said testator.

G. W. Walker, K.C., and *Charles Murphy*, for the plaintiff.

Serjeant Matheson, K.C., *Jellett*, K.C., and *Oliver Murphy*, for defendants.

The arguments were similar to those reported in the Court of Appeal, *infra*.

BARTON, J.:—

Robert Ball Steele made his will in 1899, whereby he devised his fee-simple estates in counties Kildare and Dublin, charged with annuities in favour of his two daughters and his younger son, to his elder son, Robert Ball Steele, for life, with remainder to his first and other sons in tail, with remainders over. He gave a bequest of household goods, furniture, and effects, and made his younger son, John Treacy Steele, his residuary legatee. He appointed a son-in-law to be his executor.

The Kildare estate comprised thirty-six holdings, and the Dublin estate comprised five holdings.

On the 1st January, 1906, the testator signed thirty-one agreements with thirty-one out of the thirty-six tenants of his Kildare estate for the sale to them of their holdings under the Irish Land Purchase Act, 1903. On the 31st January he swore an affidavit verifying an originating application to the Irish Land Commission (Estates Commissioners) applying to have all his estate in the county Kildare declared fit to be regarded as a separate estate for the purpose of a sale under the land-purchase Acts. In this affidavit he described himself as absolute owner of the lands, and he supplies all the particulars which have to be set forth for the purpose of a sale under the Acts. On the 1st February he signed five agreements with the five tenants on the Dublin estate. Having signed land-purchase agreements with all the tenants on his Dublin estate and with thirty-one out of thirty-six tenants on the Kildare estate, and having declared upon oath his intention of selling the whole of the Kildare estates, he, on the 7th February, 1906, made a codicil to his will. By this codicil he revoked the appointment of his son-in-law as executor, and appointing his eldest son, Robert Ball Steele, the devisee of the Kildare and Dublin estates, as executor in his stead, he adds:—"Whom I would have appointed by my will had I known that he would be residing in Ireland and retired from the Army." The codicil concludes with these words, "And I confirm my said will in other respects."

As regards the remaining five holdings on the Kildare estate, the agreements as to them were signed as follows:—Two by

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the testator on the 1st March, and one on the 22nd March, 1906. The testator died on May 23rd, 1906. No question arises as regards the agreements for the remaining two holdings on the Kildare estate which were signed by the devisee, Robert Ball Steele, in August and November, 1906. Under these circumstances counsel for the plaintiff, John Treacy Steele, have referred me to *In re Doyle's Estate* (1) and *In re Sherlock's Estate* (2), and have contended that the effect of the conditional agreements for the sale of the Kildare and Dublin estates, once they become absolute, was to effect a conversion of the estates into personalty, and to entitle him as residuary legatee to the whole purchase-money of the estates.

I agree that, if it had not been for the codicil, this would have been the result of the authorities which have applied the rule in *Lawes* v. *Bennett* (3) to these land-purchase agreements.

The decision in *Lawes* v. *Bennett* (3) was to the effect that where there is a contract giving an option of purchase of real estate, and the option is not exercised until after the death of the person creating the option, then, between his real and his personal representatives, the purchase-money is converted and goes as personal estate and not as real estate. But the testator may by his will, as in *Drant* v. *Vause* (4), or by a codicil, as in *Emuss* v. *Smith* (5), sufficiently express his intention to exclude this rule.

In *Weeding* v. *Weeding* (6) Lord Hatherley, when Vice-Chancellor, summarized the effect of *Drant* v. *Vause* (4) and *Emuss* v. *Smith* (5), in a passage which has been quoted and adopted in subsequent cases. He said :—"I understand the principle on which these cases were decided to be this :—When you find that, in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract without referring in any way to the contract he has entered into, there it is considered that there is sufficient indication of an intention to pass that property to give to the devisee all the interest, whatever it may be, that the testator had in it. This was the nature of both

(1) [1907] 1 I. R. 204, 207.
(2) [1899] 2 I. R. 561, 591.
(3) 1 Cox, Ch. C. 167.
(4) 1 Y. & C. C. C. 580.
(5) 2 De G. & S. 722.
(6) 1 J. & H. 424, at p. 431.

the authorities relied on, for, in one, the contract was before the will, and, in the other, the same effect was produced by the subsequent republication of the will."

These authorities were applied by Stirling, J., in *In re Pyle* (1) to circumstances which are quite undistinguishable from the present case. The only difference is that in *In re Pyle* (1) the contract and the codicil were executed on the same day. It was not clear which was executed first. This led Stirling, J., to say that if the contract was not executed before the codicil, but was on the eve of execution, the same result would follow, because the inference would be strong that the contract was present to the mind of the testator when he confirmed the will. There is no substantial difference in principle between an interval of a few days and an interval of a few hours.

The present case is a stronger case than *In re Pyle* (1), because the contention on behalf of the younger son in the present case makes havoc and nonsense of the whole of the will, which the codicil expressly confirmed.

The annuities which were the provisions for younger children, charged with which the estates were devised to the eldest son, would, if defendant's contention is correct, be gone; and there would be nothing left in the will except a bequest of household goods, furniture, and effects, with a residuary gift passing the whole purchase-money of the specifically devised estates to the younger son. The authorities decide that, if the testator had not republished his will after these agreements had been signed, this would be the result. But can this be the effect of this codicil which was made with fresh knowledge that these agreements had been signed or were about to be signed, and with the object of appointing his eldest son as executor, and of confirming a will the whole framework of which depended on a devise to that eldest son of these specifically named estates?

The case for the younger son rests entirely upon what seems to me to be a misapplication of the rules which regulate the effect of the republication of wills. The republication of a will brings it down to the date of the codicil, and makes it speak as a new will of that date, and take effect as if inserted in the codicil and

(1) [1895] 1 Ch. 724.

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re-executed at the date of the codicil. But this rule is subject to the limitation that the intention of the testator is not to be defeated thereby, and that, on that account, republication will not be allowed to contradict or frustrate the acts or intention of a testator by reviving a legacy which has in the interval been revoked, adeemed, or satisfied. Reference was made to *Powys* v. *Mansfield* (1), cited by Lord Kingsdown in *Hopwood* v. *Hopwood* (2); *Earl of Mountcashell* v. *Smyth* (3); *Long* v. *Moore* (4). Counsel for the residuary devisee relied upon *Powys* v. *Mansfield* (1), and that class, and contended that there was an ademption in the present case. The same contention was put forward by Lord Selborne, then Mr. Roundell Palmer, in his argument in *Drant* v. *Vause* (5), and was again put forward in *In re Pyle* (6), and was not even thought worthy of notice by the Court in either of those cases.

Serjeant Matheson suggested that there is no ademption in the case of an optional or conditional agreement for sale, pending the exercise of the option or the performance of the condition. It is true that the conversion, when the conditional contract becomes absolute, relates back to the dates of the agreements. But it is also well settled that, until the conditional contract becomes absolute, the lands are in the interval treated as real estate, and the devisee or heir-at-law, as the case may be, receives the rents and profits. There is therefore much force in Serjeant Matheson's contention.

The case, after all, resolves itself into a question upon the construction of the codicil. The Court is at liberty to look at the contents of the will which by his codicil the testator republishes and in the present case expressly confirms. Where we find, as here, that, with these pending contracts fresh in his mind, he confirms a will specifically devising these particular lands, there is, to quote Lord Hatherley's words in *Weeding* v. *Weeding* (7), a sufficient indication of an intention to pass that property to the devisee for all the interest, whatever it may be, that the testator had in it, so as to take the case out of the rule in *Lawes* v. *Bennett* (8).

R. W. L.

(1) 3 Myl. & Cr. 359, 375.
(2) 7 H. L. C. 728, at p. 747.
(3) [1895] 1 I. R. 346.
(4) [1907] 1 I. R. 315
(5) 1 Y. & C. C. C. 580.
(6) [1895] 1 Ch. 724.
(7) 1 J. & H. 424.
(8) 1 Cox, Ch. C. 167.

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John Treacy Steele appealed to the Court of Appeal (1).

S. L. Brown, K.C., G. W. Walker, K.C., and *C. Murphy*, for the appellant :—

We contend that once the Estates Commissioners sanctioned the advance of the purchase-moneys, the holdings which the testator agreed to sell to his tenants were converted into personal estate as of the date of the agreements, and that, the devise to the respondent having been adeemed, the appellant is entitled as residuary legatee to the purchase-moneys of these holdings. But for the codicil this would be clear, as the equitable doctrine of conversion applies to sales under the Irish Land Purchase Acts : *In re Doyle's Estate* (2) ; *In re Sherlock's Estate* (3). We submit, however, that the codicil does not affect the question. No doubt, for certain purposes, a codicil republishing a will makes the will speak as from the date of the codicil, "but not for the purpose of reviving a legacy revoked, adeemed, or satisfied" : *Powys* v. *Mansfield* (4). It "does not necessarily make the will operate as if made at the date of the codicil": *Hopwood* v. *Hopwood* (5) ; *Drinkwater* v. *Falconer* (6). We rely on *Shephard* v. *Knollys* (7) ; Sugden's Law of Property, 223. The codicil was made for a particular purpose, namely, to change the executor, and the confirmation of the will contained in it was merely a matter of form. Such words would not prevent satisfaction of a legacy : *Izard* v. *Hurst* (8) ; nor revive a part of a will revoked by a former codicil : *Crosbie* v. *Macdoual* (9) ; nor revive an adeemed legacy : *Montague* v. *Montague* (10) ; *Sidney* v. *Sidney* (11) ; *Booker* v. *Allen* (12) ; *Monck* v. *Monck* (13) ; *Stillwell* v. *Mellersh* (14) ; *Cowper* v. *Mantell* (15) ; *Mountcashell* v. *Smyth* (16) Here the devise to the respondent was adeemed in fact ; the lands

(1) Before PALLES, C.B., and HOLMES and CHERRY, L.JJ.
(2) [1907] 1 I. R. 204.
(3) [1899] 2 I. R. 561.
(4) 3 My. & Cr. 359.
(5) 7 H. L. C. 728.
(6) 2 Ves. 622.
(7) 1 Jac. & Walk. 499.
(8) 2 Freem. 224.
(9) 4 Ves. 610.
(10) 15 Beav. 565.
(11) L. R. 17 Eq. 65.
(12) 2 Russ. & Myl. 270.
(13) 1 Ball & Beatt. 298.
(14) 20 L. J. Ch. (N. S.) 356.
(15) 22 Beav. 223.
(16) [1895] 1 I. R. 346.

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were sold, and there was nothing left for the devise to operate on. That the sales were not completed at the death of the testator is immaterial: *Farrar* v. *Earl of Winterton* (1); *Beddington* v. *Baumann* (2); *Lawes* v. *Bennett* (3). *Weeding* v. *Weeding* (4) is in our favour. If there was an ademption in fact, the intention of the testator is immaterial: *Slater* v. *Slater* (5). *Drant* v. *Vause* (6) and *Emuss* v. *Smith* (7) will be relied on by the other side, but those were cases of an option to purchase, where the property remained until the option was exercised. In any case the appellant is entitled to the purchase-moneys of the holdings the purchase-agreements of which were signed subsequent to the codicil.

Serjeant Matheson, K.C., *Jellett, K.C.*, and *Oliver Murphy*, for the respondent:—

The question here is one of intention. We admit that a codicil republishing and confirming a will cannot set up a legacy which has been adeemed, satisfied, or revoked. In the case of ademption the property is gone; in that of satisfaction the legatee is paid off; in the case of revocation express words would be necessary to restore the gift which had been revoked. Here the case is different; the testator, who had by his will settled his real estate on the respondent, and then signed the purchase-agreements, remained in possession of that estate, enjoying the rents and profits; the lands were there in the possession of the occupying tenants as before; admittedly there could have been no conversion until the Estates Commissioners sanctioned the advance of the purchase-money, so that from the date of testator's death until the date of the advance the respondent would, even on the appellant's argument, have been entitled to the rents and profits, and it could never have been the intention of the testator that the respondent should have been entitled during that period, and that thenceforth the appellant should be entitled as residuary legatee. When the testator, having signed the purchase-agreements, and having sworn an affidavit verifying the originating application,

(1) 5 Beav. 1.
(2) [1903] A. C. 13.
(3) 1 Cox, Ch. C. 167.
(4) 1 J. & H. 424.
(5) [1907] 1 Ch. 665, at 671.
(6) 1 Y. & C. C. C. 580.
(7) 2 De G. & S. 722.

which comprised all the holdings on both estates, shortly afterwards made a codicil to his will which confirmed the will, it is clear he intended that the interest he then had in the lands should pass by the devise. In *In re Lowman, Devenish* v. *Pester* (1), Lindley, L.J., said :—" What, after all, is a devise of land ? It is only a devise of such estate or interest as the devisor has in the land, and *prima facie* whatever estate or interest the testator has in the land will pass under a devise of it by that name, if it is specifically referred to, so as to show that the testator had that particular land in his mind, and if there is nothing else to answer the description." We rely on *Drant* v. *Vause* (2), *Emuss* v. *Smith* (3), and *Pyle* v. *Pyle* (4). The latter case cannot be distinguished from the present. It is said that *Drant* v. *Vause* (2) and *Emuss* v. *Smith* (3) were cases of option ; but here also the completion of the contracts for sale depended upon the option of third parties, namely, the Estates Commissioners ; if they had not sanctioned the advance, the entire sale would have fallen through, as in *Finnemor's Estate* (5). As all the holdings were included in the originating application, including the three in respect of which the testator signed purchase-agreements after the date of the codicil, we contend that the respondent is entitled to the purchase-moneys of these also.

[The following cases were also cited :—*Lysaght* v. *Edwards* (6), *In re Isaacs* (7), and *Edwards* v. *West* (8).]

PALLES, C.B. :— April 21.

The question upon this appeal is whether a devise contained in the will of Robert Ball Steele, and confirmed by his codicil, of his estates in the counties of Kildare and Dublin, was adeemed by certain agreements made by the testator for sale of portions of those lands to tenants under the Land Purchase Act of 1903, to the extent of the portions of the lands comprised in those agreements.

The will bears date the 25th November, 1899. At that time

(1) [1895] 2 Ch. 348 at 354.
(2) 1 Y. & C. Ch. C. 580.
(3) 2 De G. & S. 722.
(4) [1895] 1 Ch. 724.
(5) [1913] 1 I. R. 130, 137.
(6) 2 Ch. D. 499.
(7) [1894] 3 Ch. 506.
(8) 7 Ch. D. 858.

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the testator was seised in fee of the estates in Kildare and Dublin, and appears to have had four children living, viz., Major Robert Ball Steele the younger, the respondent in this appeal, who was his eldest son; John Treacy Steele, the appellant; and two daughters, Anne Treacy Steele, who was unmarried; and Catherine, who was married to Arthur M'Cormick.

The will commences with a recital that the testator is absolute owner of certain estates in the counties of Kildare and Dublin; and then proceeds to charge those estates with life annuities for his younger son, John Treacy Steele, and for each of his two daughters; and subject to those annuities he devises his said estates to the use of his elder son, Robert Ball Steele, for life, with remainder to his first and other sons in tail male, with remainder to his younger son, John Treacy Steele, for life, remainder to his first and other sons in tail male, with an ultimate remainder to the testator's own right heirs.

He then bequeaths to his unmarried daughter, Anne Treacy Steele, his household goods, furniture, and effects, save his pictures and plate, which he bequeaths to his elder son, Robert Ball Steele; and finally, he appoints his son, John Treacy Steele, his residuary devisee and legatee; and his son-in-law, Arthur M'Cormick, executor of his will.

On the 1st January, 1906, being within two months of the execution of the codicil to his will, he signed separate agreements with each of thirty-one of his thirty-six tenants in the county Kildare. Each of these agreements is in the same form, and thereby he agreed that in case an estate of which the tenant's holding formed a part should be sold under the provisions of the Irish Land Act, 1903, he should sell, and the tenant should purchase, the fee-simple of the holding for a specified sum, upon which it was provided that interest should be payable to the Irish Land Commission from the date of the agreement, and that the sale should be carried out by means of a vesting order. In the same month he swore an affidavit verifying an original application to the Irish Land Commission to have all his Kildare estates declared fit to be regarded as separate estates for the purposes of sale under the Act of 1903.

On the 1st of February, 1906, the testator signed five

similar agreements with tenants of portions of his Dublin estate.

On the 7th February, 1906, he made a codicil to his will, whereby he revoked the appointment of Arthur M'Cormick as executor of his will, and appointed his son, Major Robert Ball Steele, sole executor; stating that he would have appointed him sole executor "had he known that he would be residing in Ireland, and retired from the army"; and he confirmed his will in other respects.

On the 17th February, 1906, the testator made an originating application to the Irish Land Commission in respect of his Dublin estate; and in March, 1906, he signed agreements with three others of the tenants of his Kildare estate similar to those which I have already stated.

The testator died on the 23rd May, 1906. The conditions contained in the agreements of an estate of which the tenants' holdings formed part being sold under the Act of 1903, were performed not, however, during his life, but after his death.

Under these circumstances, Barton, J., was of opinion that if it had not been for the codicil, once the conditions contained in the agreements had been performed, and the agreements had thus become absolute, the result of the application of the rule laid down by Lord Kenyon in *Lawes* v. *Bennett* (1) would have been to effect a conversion of the devised estates into personalty, and that the residuary legatee, the present appellant, would have been entitled to the purchase-moneys.

He, however, also held that the codicil indicated a contrary intention; and consequently that the purchase-moneys were bound by the limitations contained in the will.

It is not absolutely necessary for us to decide the first question upon which Barton, J., has thus expressed an opinion. I shall hereafter say something in reference to it; but I prefer to consider, in the first instance, the effective *ratio decidendi* of Barton, J., that is the effect of the codicil, upon the assumption that the agreements did operate to adeem the devise of the lands agreed to be sold.

(1) 1 Cox, C. C. 167.

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In the opinion of Barton, J., upon this second question, I entirely concur, and for the reasons he has expressed. We have here the three circumstances which occurred in *Emuss* v. *Smith* (1), and in *Pyle* v. *Pyle* (2), viz., the specific devise, the conditional nature of the contracts for sale, and the republication after the contract of the will by a codicil which did not refer to those contracts. If the rule laid down in *Lawes* v. *Bennett* (3) be, as I think it is, quite too firmly established to be questioned in this, or indeed in any, Court, so, too, I hold to be firmly established the exception to the rule where there is the concurrence of these three circumstances. In *Drant* v. *Vause* (4), decided in 1842, the will was made after the contract for sale, and therefore there was no necessity for republication, and the sole matter to distinguish it from *Lawes* v. *Bennett* (3) was the specific nature of the devise. The report of the judgment of Lord Justice Knight-Bruce, then Vice-Chancellor, after referring to the general terms in which the will in *Lawes* v. *Bennett* (3) was expressed, "to which," he says, "Lord Kenyon, at the commencement of his judgment, had adverted," proceeds: "Here the will was in very special terms. Without, therefore, meaning to suggest the slightest doubt as to the soundness of the decision in *Lawes* v. *Bennett* (3), His Honour was of opinion that, the testator having made specific mention in his will of the estate which had been *previously* the subject of the lease," which gave the option to the lessee to purchase, "the general rule established by the authorities did not apply."

Emuss v. *Smith* (1) was decided six years later by the same Vice-Chancellor. In it the devise was specific, and although made before the contract, the will in which it was contained was republished after the contract. The Vice-Chancellor, after stating that it was unnecessary to decide how the case would have stood had there not been a republication of the will, or had the contract been an absolute one not resting in option, nor exercised during the life of the testator, decided the case as it stood, taking together the language of the will and the language and nature of the contract, and upon the fact that no option was expressed

(1) 2 De G. & S. 722.
(2) [1895] 1 Ch. 724.
(3) 1 Cox, C. C. 167.
(4) 1 Y. & C. Ch. C. 580.

during the life of the testator, coupled with the republication of the codicil.

These cases were next under consideration in 1861, when they came before Lord Hatherley, then Vice-Chancellor Sir W. Page-Wood, in *Weeding* v. *Weeding* (1), and from them that great Judge deduced the following principle, which, as far as I can find, has ever since been followed :—

"When you find that in a will, made *after* a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract without referring in any way to the contract . . . then it is considered that there is sufficient indication of an intention to pass that property, to give to the devisee all the interest, whatever it may be, that the testator had in it." And he adds: "This was the nature of both the authorities relied on"—i.e., *Drant* v. *Vause* (2) and *Emuss* v. *Smith* (3)—"for, in one, the contract was before the will, and, in the other the same effect was produced by the subsequent republication of the will."

Lord Hatherley then distinguishes the case before him from *Drant* v. *Vause* (2) and *Emuss* v. *Smith* (3), upon the ground that the will was before the contract of sale, and was not republished after the contract.

In re Pyle, *Pyle* v. *Pyle* (4), was a decision of Lord Justice Stirling when he was a Judge of first instance. In that case the will was, as here, before the contract; but on the day on which the latter was executed, the testator made a codicil which expressly confirmed the will. Mr. Justice Stirling, after referring to *Weeding* v. *Weeding* (1), held—following *Emuss* v. *Smith* (3)—that the sale moneys were bound by the limitations of the will. There there was an uncertainty whether the codicil or the contract, which were both executed on the same day, was executed first; but this circumstance was held by the learned Judge to be immaterial, as in either case the contract must have been present to the mind of the testator when he executed his will. This case is important here, not only as to the general question, but especially in reference to the lands the subject of the agreements

(1) 1 J. & H. 424.
(2) 1 Y. & C. Ch. C. 580.
(3) 2 De G. & S. 722.
(4) [1895] 1 Ch. 724.

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executed after the codicil, which, in my opinion, the testator, at the time of the codicil, contemplated executing.

The appellant's counsel strongly relied upon cases of the class of *Powys* v. *Mansfield* (1), and *Hopwood* v. *Hopwood* (2), in which it is stated that a codicil republishing a will does not revive a legacy revoked, adeemed, or satisfied. That doctrine, in my opinion, applies to legacies either expressly revoked or adeemed by subsequent gifts or covenants to which the presumption against double portions applies; and not to a case such as the present, in which the question depends upon the intention expressed in the subsequent testamentary instrument. *Powys* v. *Mansfield* (1) was, as Barton, J., rightly observed, cited in *Drant* v. *Vause* (3) and in *In re Pyle* (4); and in the judgments in these two latter cases it was not thought necessary to distinguish or even to refer to it.

If, then, it had not been that Barton, J., held that, but for the republication of the will, the appellant would have been entitled to the purchase-money, I should have said nothing more than that the appeal should be dismissed with costs. As, however, Barton, J., has thought it right to express an opinion on this latter question, I fear that a simple affirmance of his judgment might be deemed an affirmance of his opinion upon this last question also; and, as I am not prepared to agree in that opinion, I must, to guard myself against being supposed to do so, add something to indicate the reasons why I entertain a serious doubt on the question. At the same time, my present opinion must be taken, not as a concluded one, but as provisional only, and subject to further consideration, if the question shall hereafter arise before me; as, strangely enough, the question, in the view in which it presents itself to my mind, has not been argued here; and as we agree with Barton, J., on the other question, we did not think it right to put the parties to the expense of a second argument.

The question, however, is one which must necessarily occur whenever agreements for sale to tenants intervene between a testamentary disposition of a landlord and his death; and two

(1) 3 My. & Cr. 359.
(2) 7 H. L. C. 728.
(3) 1 Y. & C. Ch. C. 580.
(4) [1895] 1 Ch. 724

decisions of Courts of first instance have found their way into the reports, which, if the opinion I at present entertain be correct, are likely to mislead.

Mr. Justice Barton's decision on this point is apparently based on the judgment of Holmes, L.J., in *In re Sherlock's Estate* (1) in which the Lord Justice lucidly expounds the principle of the relation back of the conversion effected by conditional contracts to the date of the contract—a principle in which I entirely concur, but which does not support Barton, J.'s, decision—and on the decision of Wylie, J., in *Doyle's Estate* (2) and of Barton, J., himself in *Jones* v. *Bailey* (3), neither of which latter decisions binds this Court.

In *In re Sherlock's Estate* (1) the question arose under the Act of 1885, and to it the statutory provisions of the Act of 1903 did not apply; whilst, although the latter two cases arose on the latter Act, in neither did it appear to have occurred, either to the learned counsel or to the Judge, that it was material to contrast the relevant provisions of that latter Act with those of the previous legislation. I think that this question cannot be decided without such a contrast, as there is such a difference between them that I should find great difficulty in holding that the judgment of my brother Holmes in relation to ademption can apply to a purchase under the Act of 1903, under such conditional agreements as we have here, in cases where the testator dies before the performance of the condition.

I premise that the effect, in working a conversion, of a binding agreement to convey, as distinguished from an actual conveyance, is undoubtedly the equitable doctrine that that which ought to have been done is to be deemed to have been done; and that it is for that reason that a binding agreement to transfer property is, for that purpose, treated as having the same effect as the actual transfer of the property in pursuance of the agreement. It follows that where property is transferred by the operation of a statute in pursuance of an agreement, the agreement cannot work an ademption, if the statute provide that the actual transfer itself shall not have that effect.

(1) [1899] 2 I. R. 561.
(2) [1907] 1 I. R. 204.
(3) [1910] 1 I. R. 110.

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Now, the Act of 1903 contains a provision (section 16) that the effect of the vesting order, when the Land Commission agree to purchase property, is to vest in the Commission the fee-simple of the land, subject to certain rights and interests defined by the section, but not material to be stated here, but, save as regards those rights and interests, and to the provisions of the Act, discharged from "the *claims* of all persons who are interested in the land, whether in respect of superior or intervening interests or incumbrances or otherwise; and *all such claims* shall, as from the date of the vesting order, cease as regards the land"; and then follows a provision not identical with any previous enactment of the code:—"and all such claims shall *attach to the purchase-money, in like manner* as immediately before the date of the order they attached to the land."

The sales here were not *to* the Land Commission; and consequently the section, *proprio vigore*, would not apply; but section 24 enacts that, in the case of a sale to a person other than the Land Commission, which is the present case, as soon as the land is vested in the purchaser, the Land Commission shall make an order attaching claims to the purchase-money; and that order is declared to be "as effectual *for that purpose*" —*i.e.* for the purpose of attaching claims to the purchase-money— "as a vesting order made by the Land Commission vesting land in them." Orders attaching claims were made in the matter of the sales in question here. Thus the provision I have read from section 16 applies here.

As to the effect of this provision of section 16, had it stood alone, I should have thought that there would be no doubt that the "claims" attached by it to the purchase-money included the claims of the vendors and those claiming through them, as well as those of owners of superior or intervening interests or incumbrances; but all possible question as to this is removed by section 25, sub-sect. 2, which describes the persons whose claims have been attached to the purchase-money by the words "whether as *vendor* or incumbrancer or owner of a superior or intervening interest.

Now, in the present case, as the condition of the estate of which the respective holdings formed parts being sold under

the provisions of the Act of 1903 was not performed during the life of the testator, the lands upon his death passed under the devise (subject to the annuities) to the respondent here for life, with remainder to his first and other sons in tail male; and were so vested in them respectively, in the words of the statute, "immediately before the date of the vesting order"; and the respondent and his eldest son had at that time valid "claims" within the meaning of section 16, as tenant for life and tenant in tail male in remainder respectively, to the lands sold; and I am unable to see why those claims did not under the express words of that section attach "to the purchase-money in the like manner as immediately before the order they attached to the land"; that is, the previous limitations of the land attached to, and bound, the purchase-money. If so, there could be no ademption. In the ordinary case of ademption the effect of the conversion is that nothing remains to answer the description of the property devised. The thing devised is land; the property of the testator in the land has ceased to exist. A new subject-matter, the purchase-money, has become vested in the testator; but the doctrine of law is that the mere intention to give the land does not, without more, include an intention to give the purchase-money, and, therefore, that the purchase-money has not been given to the devisee.

But in the present case, assuming for the moment that the codicil had not been executed, although the construction which the law would have put on the words of the will would have been that *they* did not indicate an intention to give the purchase-money to the devisees, the Act of Parliament would step in; and that statute gives to a sale under the Act a more limited effect than an ordinary sale would have had—such a limited effect as precludes it working an ademption.

So much for the Act of 1903, upon the effect of which the decision of this case must rest. I have now to contrast the enactment I have referred to (section 16) with any similar provisions contained in the previous statutes of the code. This is necessary only to show that the conclusion I am inclined to arrive at on this question is not contrary to any decision binding on this Court. The only enactments I can find which are at all

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analogous are in section 9 (5) of the Act of 1885, and section 14 of the Act of 1887. The sub-section in the Act of 1885 provides that in the case of a sale by a landlord to a tenant, where it is agreed that the sale shall be carried into effect by a vesting order of the Land Commission, such vesting order may be made though the landlord is only tenant for life, or has the powers of a tenant for life, and whether or not the holding, either solely or in common with other lands, is subject to any incumbrance or annual charge, and whether such incumbrance or annual charge affects only a partial interest in the estate sold; and then proceeds, "but the purchase-money shall, in all cases *where the Court shall think fit*, be paid into Court to abide the further order of the Court, and shall, for all purposes as regards the rights or claims of any person to or against the estate sold, represent such estate, and unless and so far as the vesting order shall otherwise declare, the rights and claims of all persons in respect of the estate sold, or any incumbrance or annual charge thereon, shall from the date of such vesting order be transferred to the purchase-money, and the purchaser shall be wholly freed from any liability or claim in respect thereof."

Section 14 (1) of the Act of 1887 is to substantially the same effect, but with more extended operation; but it need not be referred to, as there is no decision of this Court that a sale under that Act works an ademption.

The radical difference between the provision in section 9 (5) of the Act of 1885, and that which is contained in section 16 of the Act of 1903, is that the latter portion of section 9 (5) of the Act of 1885 appears to be limited to cases in which the Court has thought fit to exercise the power of directing the purchase-money to be paid into Court; and if that be its true construction, the provision is discretionary, and certainly could not apply unless that discretion were exercised; and the statute does not contain any indication of an intention that the rights of the parties (as distinguished from the mode of enforcing them) should so far depend upon the exercise of this discretion that the sale should operate as an ademption if, but only if, the money was paid into Court. As contrasted with this, the application of section 16 of the Act of 1903 is not only clear and free

from doubt, but it does not depend upon discretion. It is absolute; and peremptorily governs the devolution of the purchase-money and the rights of the parties to it.

I by no means say that this provision in the Act of 1885 had any bearing on the question discussed in *Sherlock's Estate* (1). I rather think it had not; but, at any rate, the matter was not there discussed, and decisions on it can have no bearing on the wholly different provision in section 16 of the Act of 1903.

So, too, under section 14 (1) of the Act of 1887, the provision that the claims shall attach to the purchase-money is plainly dependent on the exercise by the Land Commission of a discretionary power. In the cases of *Doyle's Estate* (2) and *Jones* v. *Bailey* (3), in which the decisions upon the Act of 1885 were applied to cases under the Act of 1903, the distinction between the two Acts is not adverted to; but, be this as it may, they are not binding upon this Court.

There is a recent case, *Latham* v. *Travers* (4), which first came before the Master of the Rolls, and subsequently before this Court, in which a question arose as to the operation of a sale under the Act of 1903, as a conversion of the property of one of the vendors, who was a lunatic, upon which a consideration of section 16 of the Act of 1903 might have been material. It, however, was not referred to; and the *decision* has no bearing on the present case, as it turned upon a section of our Lunacy Act of 1871, which was held to prevent the sale being a conversion.

Upon the whole case, I am clearly of opinion that the appeal should be dismissed with costs.

HOLMES, L.J.:—

The question for decision in this appeal, although difficult and important, can be briefly stated.

Robert Ball Steele being seised in fee-simple of estates in counties Kildare and Dublin, executed his will on the 25th November, 1899, and thereby charged the said estates with three life annuities, one of £60 in favour of his younger son, another of £60 in favour of his daughter Anne, and a third of £25 in favour

(1) [1899] 2 I. R. 561.
(2) [1907] 1 I. R. 204.
(3) [1910] 1 I. R. 110.
(4) [1912] 1 I. R. 306.

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of his daughter Catherine. Subject thereto he devised the said estates to his eldest son for life, with remainder to his first and other sons in tail male, with remainder to his younger son for life, with remainder to his first and other sons in tail male, with remainder to his own right heirs. He then bequeathed to his daughter Anne his household effects, except his pictures and plate, which he left to his eldest son. He appointed his younger son his residuary devisee and legatee, and his son-in-law, Arthur M'Cormick, executor.

Some time after the passing of the Irish Land Purchase Act of 1903, he took steps to sell to his tenants on the Dublin and Kildare estates their holdings, with the result that before his death on the 23rd May, 1906, he had entered into agreements with all his tenants in both counties except two. Thirty-one of the Kildare agreements were signed on the 1st January, 1906, two on the 1st March, and one on the 2nd March, while all the Dublin agreements were signed on the 1st February. Another document of importance is the originating application to the Irish Land Commission to have all his estates in county Kildare fit to be regarded as a separate estate for the purpose of a sale under the Land Purchase Acts; and I find that this application was verified by affidavit on the 31st January, 1906, and lodged in the offices of the Commission on the 28th February following. It will be noted that agreements relating to two of the Kildare holdings were not signed in the owner's lifetime. They were, however, entered into by his eldest son in the November following his father's death.

The agreements were in the form then prescribed by the Land Commission, and were conditional on the holdings in each county being declared an estate by the Estates Commissioners, which was done on the 6th June, 1912. The only other matter relevant to this appeal is the execution by Mr. Steele of a codicil to his will, dated the 7th February, 1906, by which he revoked the appointment of his son-in-law, Arthur M'Cormick, as the executor of his will, and appointed his eldest son as his sole executor, adding he would have so appointed him by his will had he known that he would be residing in Ireland and retired from the army. He also thereby confirmed his will in other respects.

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A lawyer would probably hazard a guess that litigation arising from the aforesaid facts would relate to questions of ademption or equitable conversion, and he would be right.

The younger son, the plaintiff, seeks for a declaration that the effect of his father's agreements with the tenants was, on the fulfilment of the condition to which they were subject, to convert into personal estate the lands devised to his brother as from the dates of the agreements, and to give him, as residuary legatee, the proceeds of the sales. The defendants, the eldest son of the testator and his eldest son, reply that the conversion into personalty dates only from the fulfilment of the condition, and that, as up to that period the property sold continued to be real estate, the proceeds of the sale now belong to the first-named for life, with remainder to the other absolutely. It is also argued on their behalf that even if the legal effect of the will if it had stood alone would have been as contended by the plaintiff, the codicil made on the 7th February, 1906, after the agreements had been executed, gave the testator's then existing interest in the premises to the eldest son for life, with remainder to his eldest son. A question of ademption and equitable conversion not unlike that arising in the present appeal was argued in this Court in the year 1899 in *In re Sherlock's Estate* (1).

In one view of the facts in that case—the view which I accepted—certain documents were signed in the form prescribed under the Land Purchase Act of 1885, by the agent of the landlord and by certain of his tenants, and these documents might be construed as agreements for the sale and purchase of the latters' holdings subject to certain conditions as to advances by the Land Commission. I was of opinion that these documents constituted complete contracts subject to the fulfilment of the conditions. Soon afterwards the landlord died, having by will, made some years previous to the execution of the documents, devised the lands to his wife with remainder to his two sons, and appointed one of his sons residuary legatee. After the landlord's death, the Land Commission sanctioned the advances, thus fulfilling the conditions. The litigation, as in this case, arose after the

(1) [1899] 2 I. R. 561.

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sales were completed between the devisees and residuary legatee; and, assuming that my view of the facts and of the construction of the documents was correct, the case is precisely similar to the present, except in so far as the execution of Mr. Steele's codicil makes a difference. In these circumstances I held that as between the real and personal representatives of the landlord, who died before the sanction was given by the Land Commission, there was a conversion of the lands into personal estate as from the dates of the agreements.

This was not, however, the judgment of the Court. The Lord Chancellor and FitzGibbon, L.J., while offering no opinion as to whether, if there had been conditional agreements for the sale and purchase of the holdings, the conversion into personalty upon fulfilment of the conditions related back to the date of the agreements, held that it was unnecessary to decide this question, inasmuch as, quite apart therefrom, the devisees were entitled to succeed on wholly different grounds, which I was then unable to accept, and which do not exist in the present case. The judgment I then delivered is now no more binding on me than on my colleagues, and I have thought it my duty to reconsider it. I have always felt that the doctrine of equitable conversion has been unduly extended, and I should have been glad to follow any authority enabling me to hold that in the agreements before us the lands remained the real estate of the vendor until the conditions were fulfilled. But, apart from some subsequent legislation, to which I shall presently refer, I have failed to find any reason for coming to a different conclusion, and in dealing with this branch of the case I can add nothing to what I said in *In re Sherlock's Estate* (1).

There remains the question arising from the codicil which was executed after thirty-one of the Kildare agreements and all the Dublin agreements had been signed. The words relied on by the defendants are—"I confirm my said will in other respects"; and it is argued that the result thereof is the same as if there had been repeated in the codicil the gifts in the will. Let me assume that this were actually the case,

(1) [1899] 2 I. R. 561.

that the testator had copied in the codicil all the language of the will, except the appointment of the executor, or, to put the same assumption in another form, that the testator's will had been executed on the 7th February, 1906, instead of some years earlier, what would have been the construction? Could it be argued that when, years after the testator's death, during which the devisee named in the will or codicil had been in enjoyment of the profits of the lands, the conditional agreements had, by the fulfilment of the conditions, become absolute and complete, the testamentary instrument executed after the agreements had been entered into must be read as if it contained no devise or specific gift of the lands? Mr. Walker would say, "Yes, because the effect in law of what happened was to cause the lands to disappear, so as to leave no subject-matter for the gift to operate on." I prefer to apply to conditional contracts the view taken by Lord Hatherley in *Weeding* v. *Weeding* (1) of the principle on which *Drant* v. *Vause* (2) and *Emuss* v. *Smith* (3) were decided. He says that "when you find that in a will made after a contract giving an option of purchase the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract without referring in any way to the contract he has entered into, then it is considered that there is sufficient indication of an intention to pass that property to give to the devisee all the interest, whatever it may be, that the testator had in it. This was the nature of both the authorities relied on, for in one the contract was before the will, and in the other the same effect was produced by the subsequent republication of the will." I quite agree with Mr. Walker that the confirmation in other respects of the will does not, in all cases, make the contents of the will, except those altered by the codicil, speak as of the date of the latter. A legacy revoked by a previous codicil will not be restored. The testator may have so completely disposed of property given by the will that there would no longer be any subject to which the gift, even if repeated in the codicil, could apply. Mr. Walker has argued that this is what has happened in the present case.

He has pressed on the Court the proposition that the effect

(1) 1 J. & H. 424.
(2) 1 Y. & C. Ch. C. 580.
(3) 2 De G. & S. 722.

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of the fulfilment of the conditions was to leave no subject-matter for the gift when the codicil confirmed the will. This is, I think, the fallacy of his argument. Mr. Steele had then a distinct and valuable interest in the two estates, which the confirmation of the will gave to the devisees, and which became their absolute property on the testator's death. This is, I think, in accordance with the law as stated in different authorities, to three of which I have referred. It is put most clearly in *In re Pyle* (1). I am satisfied that the principle laid down therein is applicable to the present case, and I am not aware that any doubt has been thrown on that principle since it was decided by Stirling, J., in 1895. It rules not only the agreements that were signed previous to the execution of the codicil, but also the three which were signed on the 1st and 2nd March following.

The lease and the codicil in *In re Pyle* (1) were executed on the same day, but it was uncertain which of the two preceded the other. Stirling, J., held that this was immaterial, inasmuch as the lease, if not actually executed, must have been present to the mind of the testator when he confirmed his will. In the present case the originating application to the Land Commission, verified by Mr. Steele's affidavit of the 31st January, shows that he was then intending to sell all his Kildare estate, and that this was present in his mind when he confirmed his will a few days later.

Having thus come to the same conclusion as Barton, J., on the questions argued in this Court, it is unnecessary for me to consider a most important matter to which my attention has since been called by the Lord Chief Baron—the effect of sections 16 (1), 24 (1), and 25 (1) of the Land Purchase Act of 1903. These provisions were not referred to by counsel on either side, and, in any circumstances, I avoid, as far as possible, dealing with questions that have not been discussed. Especially I feel it my duty to take this course at present. On the one hand, my opinion would be of little value without re-argument. On the other hand, it would be unfair to ask successful respondents to argue a question in which they are not now interested. I, therefore, confine myself to saying that if this matter comes before me hereafter I shall approach it with an open mind.

(1) [1895] 1 Ch. 724.

CHERRY, L.J.:—

I agree with the judgment of Barton, J., both in his statement of the law and in his application of it to the facts of this particular case.

The question really turns, as he says, upon the construction to be placed upon the codicil to the will; for the principles of the conversion of property in Equity in the case of contracts for sale are, apart from any consideration of the effect of the Irish Land Act, 1903, to which the Lord Chief Baron has referred, too well settled to admit of much discussion; but the effect of the confirmation of a will by a codicil at a date subsequent to a contract for sale of lands specifically devised by the will may be, on the authorities, a matter of some doubt.

Of the numerous cases cited to us in the course of the arguments, the one which most nearly resembles that now before us is the decision of Stirling, J., in *Pyle* v. *Pyle* (1); and it is also, I think, the latest in point of date. There the testator had by his will specifically devised certain freehold lands, and had bequeathed his residuary real and personal estate to other persons. He afterwards made a codicil, which did not in terms refer to the specifically devised property, but expressly confirmed his will. On the same day that he executed the codicil he granted a lease of the lands with an option to purchase, which option was accepted by the lessee, after the testator's death. Under these circumstances it was held that, whether the codicil was executed before or after the lease giving the option to purchase, the testator at the time he executed the codicil must have had the circumstances present to his mind; and that by confirming his will he had indicated a sufficient intention to pass whatever estate he had in the property to his devisee so as to take the case out of the general rule established by *Lawes* v. *Bennett* (2).

This decision of Stirling, J., was expressly based on a somewhat stronger decision of Vice-Chancellor Knight-Bruce, in *Emuss* v. *Smith* (3). There the testator made his will, by which he

(1) [1895] 1 Ch. 724.
(2) 1 Cox, Ch. C. 167.
(3) 2 De G. & S. 722.

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specifically devised a farm called "Nash's Own Farm," and he gave his residuary real and personal estate to trustees upon certain trusts. Eight years afterwards he entered into a contract by which he granted in favour of a certain person the option to purchase the farm in question, together with another farm called "Williams' Farm" which he had purchased recently, or was then about to purchase. Next year he executed a codicil to his will whereby he devised "Williams' Farm," to certain uses, but did not in any way refer to "Nash's Own Farm," and did not otherwise refer to his will. The option to purchase was, after the testator's death, accepted in respect of both the properties. Under these circumstances it was held that the purchase-money of "Nash's Own Farm" belonged to those who would have enjoyed it if the option to purchase had not been accepted.

This decision was based upon three circumstances, all of them present in the case with which we are now dealing—the specific devise in the will, the conditional nature of the contract, and the republication of the will by the codicil. "How this case would have stood," says Knight-Bruce, V.-C. (1), "if the codicil of 1839 had not amounted to a republication of the will, it is not necessary that I should say; for I am of opinion that the codicil of 1839 did effect a republication of the will."

The authority of this decision was expressly recognized by the Vice-Chancellor Page-Wood (as he then was) in the leading case of *Weeding* v. *Weeding* (2), and he has laid down a principle based upon it and a similar case of *Drant* v. *Vause* (3), which is quoted by Barton, J., in his judgment, and applied by him in the decision of this case.

Now, assuming that the principles of equitable conversion apply to contracts for sale under the Land Purchase Acts in the same way as to optional contracts of a private nature, we have it clearly established by the highest authority that the effect of a codicil, even though it does not in express terms confirm the will, amounts to a republication of the will. Surely the same principle must apply with greater force where, as in the present case, the testator

(1) De G. & Sm., at p. 735.
(2) 1 J. & H. 424.
(3) 1 Y. & C. Ch. C. 580.

in express terms confirms the will. I think, therefore, that the decision of Barton, J., is clearly right, that the effect of the confirmation of the will by the codicil is to make the specific devise of the lands apply to the only interest in the lands which the testator retained at the date of the codicil, namely, the right to receive the purchase-money. There is no doubt that the proceeds of the sale of lands may pass under a devise of the lands themselves: *In re Lowman*; *Devenish* v. *Pester* (1).

But, it is argued, although this may be true as regards the lands which the testator had contracted to sell before the execution of the codicil, the lands in respect of which contracts for sale were not entered into until after that date are in a different position, and, consequently, the three farms on the Kildare estate, where the agreements were only signed in March, 1906, must be excluded from the devise, applying the principle of *Lawes* v. *Bennett* (2).

I do not think that this is so, for though it is true that the agreements in the latter cases were not signed by the testator until after the execution of the codicil, the originating application for the sale of the entire estate, including these holdings, had been verified before that date, and was lodged shortly afterwards. In that statement he had distinctly stated his intention of selling the entire estate, so that this circumstance must have been present to his mind when he executed the codicil. I think, therefore, that Barton, J., was quite right in applying the same rule in the case of these holdings as he did in dealing with the bulk of the estates. All cases of this kind depend upon questions of presumed intention, and it would be absurd to suppose that a testator, making his will, while proceedings for the sale of his entire estates were actually pending, should make any distinction as regards the devolution of the property depending upon the purely accidental circumstance that some of the agreements had actually been executed at the date he signed his will, while others had not reached that stage.

Mr. Walker, in his able argument for the appellant, relied upon a number of authorities which he said established the proposition that the republication of a will by a codicil does not

(1) [1895] 2 Ch. 348. (2) 1 Cox, 167.

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operate so as to revive a legacy revoked, adeemed, or satisfied. The leading cases cited in support of this proposition were *Powys* v. *Mansfield* (1) and *Hopwood* v. *Hopwood* (2). Both these cases dealt with the presumption of law against double portions, where a sum of money is given by the will of a parent, or of one standing *in loco parentis* to a child, and the like sum is afterwards secured by a settlement on the marriage of that child. Very different considerations arise in cases of this kind from those which exist where there is between the date of the will and the codicil merely a change in the circumstances of the property dealt with by the will and codicil. I think, therefore, that these cases are clearly distinguishable from *In re Pyle* (3) and *Emuss* v. *Smith* (4), and, whether they are so or not, I prefer to follow the two later decisions, which I consider conclusive authorities in favour of the decision of Barton, J.

Solicitors for the appellant: *Milward Jones & Cameron.*
Solicitors for the respondent: *Moore, Kiely, & Lloyd.*

R. ST. J. C.

(1) 3 My. & Cr. 359.
(2) 7 H. L. C. 728.
(3) [1895] 1 Ch. 724.
(4) 2 De G. & S. 722.

MARY PRENDERGAST *v.* BRIDGET MONGAN AND OTHERS.

Dodd, J.
1913.
Mar. 11.

Statutory tenancy—Owner of undivided share—Jurisdiction to order sale in lieu of partition—Consent of landlord to a partition not a condition precedent to the institution of a suit for partition—Consent to a sale —Partition Acts, 1868 (31 *&* 32 *Vict. c.* 40), *section* 3; 1876 (39 *&* 40 *Vict. c.* 17), *section* 7—*Land Law* (*Ireland*) *Act*, 1881 (44 *&* 45 *Vict. c.* 49), *section* 5.

In an equity suit by an owner of an undivided share in a holding held for a statutory term, brought against the owner of the other shares, seeking for a sale in lieu of partition, the Court has jurisdiction to order such sale, notwithstanding that the landlord has not given his consent to a partition.

This was an appeal, heard by Dodd, J., at the Mayo Spring Assizes, 1913, from an order of the County Court Judge, made on the hearing of an Equity civil bill. The facts and the nature of the arguments sufficiently appear from the judgment.

Leonard, for the plaintiff.
Price and *Devitt*, for the defendants.

DODD, J.:—

The plaintiff and the defendants are entitled among them to a holding for a statutory term in Clooncondra, of 56A. 1R. 39P. at a rent of £15 15*s.* per annum.

Their rights are declared by an order of Mr. Justice Barton, dated 24th January, 1912. He declares that the plaintiff holds the land as trustee for herself and the defendants in proportion to the share of the purchase-money contributed by each of them as follows:—Mary Prendergast, £80 19*s.*; Bridget Mongan, £105 17*s.*; Kate Mongan, £37 17*s.*; and Julia Mongan, £26 12*s.* (1).

(1) The plaintiff had taken an assignment of the holding in her own name alone. The landlord had consented to the assignment to her, and she had been accepted as tenant.—REP.

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There was a further declaration that the parties liable on foot of bills of exchange or promissory notes in respect of loans made for the purchase of the said lands are entitled to be indemnified against liability for the principal of such loans by the said lands, and to be recouped such principal sums. The lands are declared also to be subject to a charge of £120 raised from the National Bank, Castlebar.

In such a state of title, the plaintiff brings a suit in the County Court for a sale in lieu of partition. The County Court Judge on the 2nd of November, 1912, appointed Mr. Kelly to make a valuation. He valued the lands at £375. I have no materials before me as to what was included in that valuation. If the value of the holding at the time of the sale was adequate, the lands would seem to have increased in value by £123 15*s.*, *i.e.* from £251 5*s.* If in the value of £375 the charge of £120 to the bank was not deducted, this would explain the figures.

At the adjourned hearing the defendants stated they were prepared to pay the plaintiff her proportion of the said sum of £375, and to take over the lands, freeing her from all claims affecting the same, and to abide by any order as to costs which the Judge might make. The appointment of the valuer was made under the Partition Act at the instance of the defendants. The plaintiff refused to accept the offer. No effort apparently was made by either party to ascertain whether the landlord would or would not consent to a sale or a partition. The lady declined the offer. The County Court Judge was then asked by the defendants to decide that he had no jurisdiction to make an order for sale in lieu of partition on the ground that the landlord had declined to consent to such partition or sale. He did so decide. In so doing he was supposed to be acting in accordance with the view of the Lord Chief Baron as expressed in *Trench* v. *Glennon* (1).

Before dealing with that authority I may point out that the proposed offer, made the basis of his decision, was also one that

(1) 34 I. L. T. R., p. 157.

required the landlord's sanction; and if he had no jurisdiction in the one case, he had none in the other.

But let us see how far the supposed decision justified his action.

I am quite accustomed to have decisions of the Chief Baron cited as authoritatively laying down propositions entirely at variance with the judgment pronounced by him. This case of *Trench* v. *Glennon* (1) was cited in argument before the Court of Appeal, in *Farrell* v. *Donnelly* (2), and because it was not dealt with by the Court it is assumed that the effect of the decision was accurately appreciated by the counsel citing it.

But when one reads the case itself as reported, apart from the headnote, it is found to be a decision the other way. The plaintiff had registered a judgment against the undivided share of one of the next-of-kin of a deceased person, and sought to enforce such judgment by a sale of the interest of the defendant. The Vice-Chancellor had held that such a judgment could not be operative. The Chief Baron dissented from that view, and, following *Cooper* v. *Cooper* (3), in the House of Lords, held that a next-of-kin took a vested interest in the chattels real of the intestate *in specie*. But inasmuch as there was no severance of the shares of each of the next-of-kin, he could not in that proceeding order a sale. If there had been a severance before the Land Acts, he could have ordered a sale; and he refers to a case then recently decided in his own Court to that effect. He declined in the exercise of his jurisdiction to appoint a receiver over four acres of land. He held that the plaintiff was not without a remedy. He could in a suit in which all of the next-of-kin were parties get relief. But the costs would overcome the profit, and he accordingly stopped a fruitless litigation. And this case is cited as an authority that a Court of Equity has no jurisdiction, unless a landlord consents, to order a sale of a judicial tenancy.

(1) 34 I. L. T. R., p. 157.
(2) [1913] 1 I. R. 50.
(3) L. R. 7 H. L. 70.

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I do not know where the County Court Judge got materials for a finding that the landlord had not consented. It was an erroneous finding, for the consent of the landlord has now been produced.

I desire to point out that the procedure, in my opinion, was not such as ought to have been adopted. The plaintiff as judicial tenant could have served the notice of intention to sell prescribed by the Acts, and unless the landlord exercised his right of pre-emption the matter could have been carried through pursuant to the provisions of the first section of the Act of 1881, and the rules applicable thereto. The County Court having control could direct proper proceedings as between the plaintiff and the landlord to close the interests of all; the landlord might even have consented to a partition. He most probably would have consented if such consent were only a matter of form to give jurisdiction, it being abundantly clear that no one in fact wanted a partition.

Counsel for the defendants, now that the consent to a sale has been produced, say it is valueless, because unless the Court has power to order partition it has no power to order a sale: for the section of the Partition Act gives the power of sale in lieu of partition. The argument is so subtle that it almost eludes analysis. It is based upon an observation of Lord Justice Holmes, in the case referred to of *Farrell* v. *Donnelly* (1). Alluding to the argument of Mr. Wylie, he says (p. 60), "If this were so, it is possible" (he actually put it so high as that) "that his inference would follow, namely, that partition would be thereby absolutely forbidden, and that as there could be no partition there could be no sale."

But he proceeds to point out that this is not so. The whole of the section forbidding partition was governed by the words "as between the Land Commission and the proprietor of the holding subject to the annuity." The present contention reduces the argument to an absurdity. It deletes even the words "it is possible" from the judgment of the Lord Justice. The landlord

(1) [1913] 1 I. R. 50.

is entitled, if he so wish, to have only one tenant, and to that tenant a right of sale is expressly given. But this right cannot be exercised, because there is no right to sub-divide without consent.

But let us deal with the argument as seriously as may be. Upon the true construction of the statute it fails. There is a double fallacy, as it appears to me, in the contention based upon the wording of section 3 of the Partition Act, 1868, "in a suit for a partition, where if this Act had not been passed." The fallacy is (*a*) in the misconstruction of the Partition Act, 1868, and (*b*) in the misapplication of section 2, and section 5, sub-section 3, of the Land Law (Ireland) Act, 1881.

I will not go into the history of the statutes and processes by which the Courts of Equity have obtained a jurisdiction to grant partition where it would not have been granted at Common Law. It is conceded in the argument addressed to me that but for the operation of the Land Law (Ireland) Act, 1881, a Court of Equity, in a case of this kind, "might have made" a decree. The section does not say "would" have made. Section 2 of the Land Law (Ireland) Act, 1881, enacts that "a tenant from year to year of a tenancy to which the Act applies shall not, *without the consent* of the landlord, sub-divide his holding"; and section 5, sub-section 3, has a similar provision in respect of statutory tenancies. In the face of those sections a Court of Equity *would refuse* a decree without the consent of the landlord that, but for this section, it might have made. But upon what grounds would it refuse? For reasons similar to those stated by Sir Anthony Hart in *North* v. *Guinan* (1). The subject-matter of that suit was a dwelling-house, held under lease for a term of years, subject to a rent and covenants. If the tenant divided the house, or altered the material form and feature of the demised buildings, he would be guilty of waste. "The partition of the house must remodel and reconstruct the fabric of the building, and it would throw *some discredit on the jurisdiction of the Court* if the landlord, disliking the alterations, should, in defiance of the decree, enter for the waste committed,

(1) Beatty, p. 342.

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and turn both parties, with the Court and its decree, out of doors." And the Lord Chancellor, not having the jurisdiction now conferred by the Partition Acts of 1868 and 1876, said, unless the parties would consent to refer it to the Master to inquire whether it would be for their benefit that this house *should be sold*, he could not, *as the bill was framed*, grant relief. He had jurisdiction to grant a partition of leaseholds under the then statute, but no jurisdiction to sell, save by consent of the parties. He cited a case of *Baring* v. *Nash* (1), decided by Sir William Grant, under the English Statute of Henry 8, on the ground that the reversion in that case was merely nominal; see also *Swan* v. *Swan* (2) and *Aimes* v. *Comyns* (3). The Court, in other words, having jurisdiction, will *refuse* a decree where a person outside the Court can treat the decree with discredit. I am of opinion that is one of the reasons for section 3 of the Act of 1868. If, "by reason of the nature of the property" . . . "or of any other circumstance," a sale would be more beneficial, the Court, notwithstanding the dissent of the other parties, may grant a decree for sale on the request of any of the persons interested. It can do what Lord Chancellor Hart could only do by consent of the parties.

Applying these principles to the land laws of Ireland, I am of opinion an Equity Court has *jurisdiction* to entertain a suit for partition of a tenancy to which the Acts apply. If the landlord consents to the sub-division, it may make a decree for partition. If the landlord does not consent, it may make a decree for a sale *in lieu* of the partition which the *landlord* forbids. Whenever the Court in a partition suit is satisfied that a partition is undesirable, or inexpedient, or, as I think, contrary to the policy of a statute, or, if you will, prohibited by a statute, the Court may order a sale. But, again, if the strictest construction be applied as between the parties to the suit, there is nothing to make a partition unlawful or impossible. The restriction is in the interest of a third party, and it is only as between the lessor and the parties

(1) 1 Ves. & B. 551.
(2) 8 Price, 518.
(3) 16 W. R. 74.

to the suit that the Land Acts operate. I am clearly of opinion that the County Court Judge had jurisdiction.

But he says if he had jurisdiction he would decline to exercise it. He had directed a valuation; the plaintiff refused to be bought out by the defendants; and no doubt, according to the authorities he was entitled to refuse a sale. But the result of such an exercise of discretion was not, I think, present to his mind. A learned Judge, Lord Blackburn, in *Pitt* v. *Jones* (1), had said he would leave the parties to their Common Law right of partition; that meant he would leave the parties to such remedy as the Common Law would afford. Equity would not intervene.

But what are the Common Law rights in this case? The plaintiff is the legal tenant, and as such, unless restrained by a Court of Equity, entitled to exercise and enjoy all the rights of a tenant. She could serve a notice of intention to sell. She had in fact got the consent of the landlord, and can proceed to a sale. What is to prevent her? The Court of Equity has declined jurisdiction. On what grounds can it interfere with the exercise of Common Law or statutory rights, to which it deliberately left the parties to the suit. There is rent to be paid; there are charges affecting the entire holding. How could it restrain a sale? How could it appoint a receiver?

The Court has now at the plaintiff's own instance complete control. It can now order a sale. It can administer equities. I have no means of knowing whether the sum assessed as the price of the holding be a full price or not. If the plaintiff by her own act puts the estate to a loss, the Court can deal with that in the matter of costs. It can regulate the mode of sale; it could, if so ill advised, I suppose give leave to one party to bid, and refuse it to another. But it can do complete justice. Why should it hold its hands? It has no right in my judgment to punish the plaintiff for declining to be bought out.

All that I can do is to order a sale in accordance with the practice of the Court, and remit the matter to be dealt with by the County Court Judge.

(1) 5 A. C. 651, at p. 659.

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I think the County Court Judge has been hardly well treated by the parties. The defendants themselves, seeking to benefit by the Partition Act, induce him to decide that the Partition Act gives him no jurisdiction. They get him to appoint a valuer. The plaintiff, on the other hand, either refrains from getting or withholds the consent of the landlord. And this appeal is the result. I will do what I can to bring the parties to something in the way of reasonableness. I will not make the costs of this appeal costs in the cause. I will make each party bear their own costs.

Solicitor for the plaintiff: *Michael Verdon.*
Solicitor for the defendants: *John Garvey.*

J. G. T.

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June 13.

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(1910. No 897.)

Mortgagor and mortgagee—Claim for account and recovery of rents by second mortgagee against first mortgagee—Statute of Limitations.

The second mortgagee of lands claimed an account against the first mortgagee of all rents and profits of the lands received by the first mortgagee after the first mortgagee had been satisfied, and repayment by the first mortgagee of any surplus of rents in his hands, and a reconveyance of the lands. The first mortgagee, who had ceased to be in possession of the lands and in receipt of the rents and profits thereof for more than six years previous to action brought, pleaded section 20 of the Common Law Procedure Act (16 & 17 Vict. c. 113) as a bar to the action.

Held, that the action, being one for redemption and other appropriate remedies, was not barred by the section pleaded.

TRIAL OF ACTION.

By indenture of lease dated 19th April, 1784, Viscount Belmore demised to Alexander Gordon the lands of Drumcoo, Clondoone, Big Ring, Little Ring, and Leehill, in the county of Fermanagh, for the term therein mentioned, with a covenant for perpetual renewal. The lands of Drumcoo therein mentioned included that portion of Drumcoo containing about 162 acres statute measure, now known as Belview, and about 14 acres 2 roods statute measure, now known as Kilmalanophy, part of Drumcoo.

By indenture of lease dated in or about May, 1774, Richard Hassard demised to the said Alexander Gordon the lands of Carrickaheenan, containing 33 acres, and also the lands of Kilmalanophy, containing 51 acres 10 perches, in the county of Fermanagh, for the term therein mentioned, with a *toties quoties* covenant for perpetual renewal thereof.

By indenture dated 1st January, 1804, made between the trustees and executors of the last will of the said Alexander Gordon and other parties, for the purpose of securing payment of the sum of £4320, balance of a sum of £5000, bequeathed by the said Alexander Gordon to his five daughters in equal shares, the said trustees and other parties therein mentioned granted and assigned to Rev. W. Ovens all the lands comprised in and demised by the said indentures of lease, to hold to the said W. Ovens, his executors, administrators, and assigns, for the remainders of the said term of years mentioned in the said leases, and all renewals thereof, subject to the proviso therein contained for redemption thereof on payment of the said sum of £4320, and the interest thereon.

By indenture dated 30th December, 1837, being the settlement made on the marriage of Robert Archdall and Catherine Gordon, all the said lands were conveyed to trustees upon trust for Robert Archdall during his life, and after his death upon trust for such issue of the said marriage as Robert Archdall should appoint.

There were two children issue of the said marriage, Gordon Archdall and Catherine Mary Archdall, afterwards Catherine Mary Collum.

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By indenture dated 8th November, 1866, being the settlement executed on the marriage of the said Gordon Archdall and Louise Blenerhassett Tincler, the said Robert Archdall, in pursuance of the powers vested in him by the said indenture of 30th December, 1837, appointed (*inter alia*) the said lands of Drumcoo and Ring to his said son Gordon Archdall, his heirs and assigns, for ever, subject to the life estate of the said Robert Archdall therein; and the said Gordon Archdall granted the same to trustees in trust for Gordon Archdall for life, and after his death upon trust to permit Louise Blenerhassett Archdall to receive an annuity of £200 charged upon the said lands, and subject thereto to the use of the child or children of the said marriage, and in default of issue for the said Gordon Archdall, his heirs and assigns.

There was issue of the said last-mentioned marriage, one child only, who died in infancy, and the said Gordon Archdall became entitled to the lands subject to the contingent jointure of £200.

By indenture dated 17th February, 1874, and made between Gordon Archdall and Mary Josephine Bentham, Gordon Archdall granted to Mary Josephine Bentham the said lands by way of mortgage to secure the repayment of the sum of £1000, then advanced, together with interest.

By a decree of the Court for Matrimonial Causes, made absolute on 16th June, 1874, the said marriage of Gordon Archdall and Louise Blenerhassett Archdall was dissolved.

On 21st November, 1874, the said Louise Blenerhassett Archdall was married to James Adolphe Poirez.

On 1st October, 1875, Gordon Archdall was married to Auguste Vickery, now Auguste Archdall, one of the defendants herein.

Catherine Mary Archdall, daughter of the said Robert Archdall, was married to Rupert Francis Collum, one of the defendants herein, in the year 1876.

Gordon Archdall died on 28th January, 1876, having by his last will devised and bequeathed all his real and personal estate to his wife Auguste Archdall.

Robert Archdall died on 25th October, 1877, having by his

last will, dated 1st April, 1876, in exercise of the powers vested in him by his marriage settlement, and of all other powers enabling him so to do, appointed to his daughter, Catherine Mary Archdall, certain lands therein mentioned, and all other lands and interests in and charges on lands, and all sums of money over which he might have any power of appointment or control. By his said will the testator also gave and appointed to the said Catherine Mary Archdall all his real and personal property of every description, and appointed her executrix. The said will was duly proved.

Upon the death of Robert Archdall, Rupert Francis Collum entered into possession and receipt of the rents of the lands of Drumcoo or Belview as mortgagee thereof, in right of his said wife, in whom the said mortgage of 1st January, 1804, had become vested.

The said Mary Josephine Bentham on 22nd February, 1878, presented a petition in the High Court of Justice in Ireland, Chancery Division, Land Judges—"In the matter of the estate of Auguste Archdall, Rupert Collum, and Catherine Mary Collum, otherwise Archdall, his wife (who were then claiming the lands on the ground that Catherine Mary Collum was the heiress-at-law of said Gordon Archdall), or some or one of them, owners of land; Mary Josephine Bentham, petitioner"—praying a sale of the said lands of Ring, and other lands comprised in the said mortgage of 17th February, 1874 (except the said lands of Drumcoo, and the lands of Cloonavoan, as to the title of both of which the petitioner had not sufficient knowledge), for the purpose of discharging the incumbrances thereon. An absolute order for the sale of said lands was made in the said matter on 27th July, 1878.

Catherine Mary Collum died on 6th February, 1889, having by her last will devised to Rupert Francis Collum all her property of every nature and kind. On the death of his wife, Rupert Francis Collum remained in possession and receipt of the rents of Drumcoo or Belview as mortgagee, under the mortgage of 1st January, 1804, until 12th January, 1893, when he was removed from the possession thereof by the receiver appointed under the decree made in the suit of *Poirez* v. *Collum*, which

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was a suit brought by Louise Bleuerhassett Poirez for the purpose of enforcing payment of the aforesaid annuity of £200.

By indenture dated 1st September, 1880, the said Auguste Archdall, as widow of Gordon Archdall, and executrix of his will, and Arthur Wilson, as executor of the said will, conveyed to Thomas Hewitt and Henry Alexander the lands of Ring and Drumcoo by way of mortgage to secure the sum of £229.

By divers mesne assignments, all the estates and interests of Mary Josephine Bentham, Thomas Hewitt, and Henry Alexander, in the sums secured by the said indentures of 17th February, 1874, and 1st September, 1880, and the securities therefor, and the lands conveyed by way of mortgage, became vested in the plaintiffs.

In pursuance of an order made in the said matter of Auguste Archdall's estate, the examiner by report dated 14th June, 1904, reported that Rupert Francis Collum entered into possession of the lands of Drumcoo, called Belview, in right of his wife, whose title was that of mortgagee under the mortgage of 1st January, 1804, and so continued until the death of his wife, when he became absolutely entitled to her interest in the said mortgage, and remained in possession as such mortgagee. The said report was confirmed by the Court.

By a further report of the examiner it appeared that the total amount due on the said mortgage of 1st January, 1804, for principal and interest to 9th February, 1889, was £1557 9*s.* 9*d.*, that Rupert Francis Collum had been overpaid on account of said mortgage, out of the lands of Ring, a sum of £451 18*s.* 8*d.*, and out of the lands of Drumcoo, or Belview, a sum of £310 3*s.* 1*d.*

By order of the Court dated 28th February, 1910, Rupert Francis Collum was ordered to lodge in Court the said sum of £451 18*s.* 8*d.* (being the amount paid to him out of the funds in Court from time to time after the said mortgage was paid off).

Rupert Francis Collum paid into Court the said sum, but still had in his hands the sum of £310 3*s.* 1*d.*, being the amount of the rents and profits of the lands of Drumcoo, or Belview, which he received as mortgagee in possession between 9th February, 1889, when his mortgage was in fact fully satisfied, and 12th January, 1893, when the receiver went into possession.

A sum of £87 18*s.* 1*d.* was still due to the plaintiffs on foot of the mortgage of 17th February, 1874, and large sums were also due to them on foot of the mortgage of 1st September, 1880.

Rupert Francis Collum refused to pay the said sum of £310 3*s.* 1*d.*, but stated that he was willing to reconvey to the parties entitled to the same any interest he might have as mortgagee in the lands of Drumcoo.

On 1st March, 1910, the receiver was discharged from the lands of Drumcoo or Belview. Since that date the plaintiffs were receiving the rents of Drumcoo, or Belview, by virtue of their mortgages.

The plaintiffs claimed, 1, a declaration that any sums due to the defendant, Rupert Francis Collum, as assignee of the mortgage of the lands of Drumcoo, or Belview, dated 1st January, 1804, had been fully paid off and discharged, and that after such discharge the said defendant had in his hands the sum of £310 3*s.* 1*d.*, rents of the said lands received by him as mortgagee in possession; and that the plaintiffs were entitled to reconveyance of the said mortgage of 1st January, 1804, without any further account.

2. If necessary, an account of the rents and profits of the said lands received by the said defendant after such mortgage was fully paid and discharged.

3. That the defendant should be ordered to pay to the plaintiffs the said sum of £310 3*s.* 1*d.*, with interest.

4. That the defendant should be ordered to deliver to the plaintiffs the title-deeds of the said lands, and to convey his estate and interest as mortgagee therein to the plaintiffs.

The defendant, Rupert Francis Collum, by his defence, pleaded section 20 of the Common Law Procedure Act (16 & 17 Vict. c. 113) as a bar to the plaintiff's claim. The defendant said that he was and always had been ready and willing to reconvey to the persons entitled any estate or interest he might have as mortgagee in the lands of Drumcoo or Belview, but he had never been furnished by the plaintiffs with any deed or document for that purpose for execution by him, and that he had not in his possession, power, or procurement any title-deeds relating to the lands of Drumcoo or Belview.

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Serjeant Matheson, K.C. (with him *H. D. Conner, K.C.*, and *Leet*), for the plaintiff:—

This is a redemption-suit. The mortgagee was overpaid in 1889. The Common Law Procedure Act, on which defendant relies, does not apply to redemption-suits: *Hood* v. *Easton* (1). The plaintiff did not become entitled to claim until it was proved that the mortgagee was overpaid.

G. W. Walker, K.C. (with him *E. S. Murphy*), for the defendant Collum:—

This is an equitable action for money had and received. We rely on section 20 of the Common Law Procedure Act as barring it. This is not a redemption-suit. It is not brought by a mortgagor. Since January, 1893, defendant has been out of possession, and has received nothing out of the premises since 1893. How can rents received between 1889 and 1893 be recovered in this action? If the action is an equitable demand for rent, it is barred by the section of the Act pleaded in the defence. If it is an action for redemption, it is barred by sections 1 and 7 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57). The claim for the lands is not a proper claim against the defendant, for he has not had possession since 1893. He has been always willing to reconvey. The whole point in *Hood* v. *Easton* (1) was whether the defendants were in possession or not. In taking accounts between mortgagee and mortgagor only six years' arrears can be claimed: section 42 of Act 3 & 4 Wm. 4, c. 27. If, in the sum due, there is no item which became due within the last preceding six years, the account will not be taken: *Knox* v. *Gye* (2). Six years' arrears only are allowed in actions for rents and profits: *Hickman* v. *Upsall* (3). In an action by a second mortgagee against a first mortgagee for an account it was held that the statute, in the absence of any acknowledgment, is a bar after six years: *Banner* v. *Berridge* (4).

E. S. Murphy: This is a personal action for rents and profits received between 1889 and 1893, and is barred unless an acknowledgment was given inferring a promise to pay. No acknowledgment has been pleaded in the reply.

(1) 2 Jur. (N. S.) 729.
(2) L. R. 5 H. L. 656.
(3) 4 Ch. D. 144.
(4) 18 Ch. D. 254.

H. D. Conner, K.C., in reply :—

On 28th February, 1910, it was ascertained that Collum had been overpaid. There is nothing due to a mortgagor by a mortgagee in possession until the account is taken.

Ross, J. :—

The defendant Rupert Francis Collum held the lands of Drumcoo, or Belview, with others, as mortgagee in right of his wife, under a mortgage dated 1st January, 1804, and remained in possession of the same until 12th January, 1893, when he was removed from possession, a receiver having been appointed over the lands in the action of *Poirez* v. *Collum*. The plaintiffs held the said lands by virtue of mortgages dated 17th February, 1874, and 1st September, 1880. On 22nd February, 1878, a petition was presented in the Land Judge's Court by the plaintiffs' predecessor in title for the sale of the lands comprised in the mortgage of 17th February, 1874.

By order made in this matter, dated 28th February, 1910, it was found, confirming the report of the examiner, that the defendant Rupert F. Collum had still in his hands the sum of £310 3*s.* 1*d.*, being the amount of the rents and profits of lands of Drumcoo, or Belview, which he received as mortgagee in possession, between 9th February, 1889, when his mortgage had been fully satisfied, and 12th January, 1893, when the receiver went into possession. The defendant relies on section 20 of the Statute of Limitations, 16 & 17 Vict. c. 113. That is the only section pleaded in the defence, and is the only section I will deal with. If, as argued by counsel for the defendant, this is merely an action of debt, then the action must be dismissed. The relief claimed in this action is that usually claimed by a mortgagor, but here it is claimed by a puisne mortgagee. At present the defendant is out of possession, but he was in possession up to 1893. A mortgagor or a puisne mortgagee has the right to get rid of a paid-off charge, and to possession, but he is entitled to more. He is entitled to any overplus of receipts in the hands of the prior mortgagee, and to all other remedies the law gives him, including a clear title. The

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defendant has offered only to reconvey the lands, but not to refund the money. That is not enough. The action is to redeem with the appropriate remedies.

As to the amount of contribution in the case of the various lands, subject to the mortgage of 1804. the defendant is bound by the account taken in the matter of *Archdall's Estate*, as to all the denominations of the lands except Belview.

I am of opinion that this is not merely an action to recover money, it is a suit requiring other remedies. The section referred to does not apply, and the only defence pleaded fails.

I find and declare that any sums due for principal and interest to the defendant Rupert Francis Collum, as assignee of the mortgage dated 1st January, 1804, so far as the same affects the lands of Drumcoo, or Belview, have been fully paid off and discharged, and that he is bound to repay to the plaintiffs as assignees of the mortgage dated 17th February, 1874, all rents and profits received by him out of the said lands since 9th February, 1889, the date when the mortgage of 1st January, 1804, was fully paid and satisfied. I direct an account to be taken by the examiner of all moneys received by the defendant over and above all due to him on his mortgage, regard being had in taking such account to the report of the examiner, dated 17th July, 1909, made in *In the matter of Archdall's Estate*. Also, the defendant is to deliver up to the plaintiffs all title-deeds in his possession or power relating to the lands of Drumcoo, or Belview, and to execute a reconveyance of said lands freed and discharged from all claims under the mortgage of 1st January, 1804.

Solicitors for the plaintiffs: *William Fry & Son.*
Solicitors for the defendants: *Falls & Co.*

D. M. S.

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June 11, 12, 21.

(1910. No. 896.)

Mortgage—Conveyance of portion of mortgaged lands "free from incumbrances"—Right of indemnity—Notice—Indemnifying lands mortgaged without notice—Right of contribution.

If the owner of lands A and B, on which a charge exists, conveys lands A for value, and gives a covenant that the lands are "free from incumbrances," the purchaser is entitled to throw the charge on lands B, so long as lands B remain in the hands of the mortgagor or of volunteers under him, but the equity ceases on a conveyance of lands B to a purchaser for value without notice.

The owner of lands A and B, subject to an annuity and a mortgage conveyed lands A for value with a covenant that the lands were free from incumbrances. He subsequently mortgaged lands B to a mortgagee without notice of the conveyance.

Held, that the mortgagee of lands B was entitled to make lands A contribute rateably with lands B towards the payment of the superior charges.

TRIAL OF ACTION.

The action was brought by the plaintiffs to compel the defendant to contribute rateably towards the payment of certain superior charges.

The facts sufficiently appear in the judgment of Ross, J. The title to the lands is fully set out in the last preceding reported case at page 227 of the present volume of reports.

Serjeant Matheson, K.C. (with him, *H. D. Conner, K.C.*, and *Leet*), for the plaintiffs:—

The conveyance to the defendant's predecessor in title contained a covenant that the lands were "free from incumbrances." That amounted to an indemnity, and the purchaser was entitled to throw the charges on the other lands in the hands of the grantor. Five days subsequent to the date of that conveyance

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the grantor mortgaged all his lands to the plaintiff's predecessors in title without notice of the prior conveyance. The purchaser for value without notice is free from the equity affecting his grantor, and henceforth all the lands must contribute rateably to the paramount charges: *Averall* v. *Wade* (1); *Tighe* v. *Dolphin* (2); *In re Roche's Estate* (3); *Stronge* v. *Hawkes* (4); *M'Carthy* v. *M'Cartie* (5).

G. W. Walker, K.C. (with him, *E. S. Murphy*), for the defendant:—

It is admitted that in the hands of the original grantor the lands are liable to indemnify: *Averall* v. *Wade* (1). *Stronge* v. *Hawkes* (4) suggests a step further. Where a judgment affects lands a prior purchaser is entitled to throw the judgment on later purchasers: *Hartley* v. *O'Flaherty* (6); *Aicken* v. *Macklin* (7); *Ker* v. *Ker* (8). Where an owner mortgaged lands, and afterwards sold a moiety to a purchaser with a covenant for further assurance, it was held that the unsold moiety must bear the mortgage: *Farrington* v. *Forrester* (9).

Although registry is not notice, a purchase of the legal estate for valuable consideration without notice is no defence to a suit for the specific performance of an equitable contract contained in a prior registered instrument: *Hamilton* v. *Lyster* (10); Madden on Registration, p. 221. An equity which is duly registered is effectual to bind property which may be the subject of grants made at a time subsequent to such registration: *Mill* v. *Hill* (11). We rely on the priority given to us by our prior registration under the Registry Acts: *Thompson* v. *Simpson* (12); *M'Carthy* v. *M'Cartie* (5). We also rely on the Statutes of Limitations, 3 & 4 Wm. 4, c. 27, sect. 42, and 16 & 17 Vict. c. 113, sect. 20.

(1) Ll. & G. temp. Sugden, 352.
(2) [1906] 1 I. R. 305.
(3) 25 L. R. I. 271.
(4) 4 D. & J. 632.
(5) [1904] 1 I. R. 100.
(6) L. & G. temp. Plunket, 208.
(7) 1 Dr. & Wal. 621.
(8) I. R. 4 Eq. 15.
(9) [1893] 2 Ch. 461.
(10) 7 Ir. Eq. 560.
(11) 3 H. L. C. 828.
(12) 1 Dr. & W. 459.

E. S. Murphy: The assignee of an equity of redemption takes it subject to equities: *Harter* v. *Colman* (1). Our right of indemnity was an equity affecting what a subsequent purchaser took. Notice of a memorial is notice of the covenants contained in the deeds: *Kettlewell* v. *Watson* (2). A purchaser is bound to inquire for and examine deeds and documents, memorials of which are registered: Madden on Registration, p. 223.

H. D. Conner, K.C., in reply:—

There is a fallacy in the arguments as to registration. Registration gives priority only where the conveyances deal with the same lands. Our rights as purchaser for value without notice are not taken away. The plaintiffs' deed takes priority over the defendant's equity, because his equity was never registered: *Barnes* v. *Racster* (3). Our claim is for a capital sum, not for annual instalments; therefore the Statute of Limitations, 3 & 4 Wm. 4, c. 27, does not apply.

June 21.

Ross, J.:—

In this action the plaintiffs claim that certain lands of the defendant should be compelled to contribute, in conjunction with lands on which the plaintiffs have incumbrances, the moneys necessary to discharge certain superior charges.

Under the settlement executed on the marriage of Gordon Archdall and Louise Tincler, after the reservation of a life estate to Robert Archdall, father of the husband, both sets of lands are charged with an annuity of £200 in favour of the wife. Subject to this the lands are settled on the husband for life with limitations over for the issue of the marriage. There was only one child, who died in infancy, and thereupon the entire interest in all the lands subject as aforesaid vested in the husband, Gordon Archdall.

On the 15th October, 1872, Gordon Archdall by a demise for a long term of years mortgaged all the lands for a sum of £541,

(1) 19 Ch. D. 630.
(2) 26 Ch. D. 501.
(3) 1 Y. & C. Ch. C. 401.

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and further advances to the extent of £400. On the 12th February, 1874, the said Gordon Archdall, in consideration of £200, conveyed the lands of Clonavone, and Kilmalanophy, which is part of Drumcoo, to his sister, Catherine Archdall, absolutely, with a covenant that the lands were free from incumbrances. It was registered on the 18th February, 1874. By an indenture dated 17th February, 1874, but not registered till 25th March, 1874, Gordon Archdall mortgaged to Mrs. Bentham the lands of Ring, Drumbane, and Drumrane as well as Clonavone and Drumcoo, to secure £1000.

The marriage between Gordon Archdall and his wife Louise was dissolved by the Divorce Court. The wife married James Poirez, and the husband married Auguste Vickery. Catherine Archdall married the defendant, Rupert Collum, in 1876. She died in 1889, having left all her property to her husband. Gordon Archdall died in 1876, having left all his property to his wife Auguste. His father, Robert Archdall, died in 1877, from which date the £200 annuity became payable to Madame Poirez.

The mortgage of 17th February, 1874, for £1000, and a mortgage of 1st September, 1880, have been assigned to the plaintiffs. The defendant has occupied Kilmalanophy down to the present time, and Clonavone down to the 12th January, 1893, when he was dispossessed by a receiver. The receiver was appointed in an action brought by Madame Poirez in the Chancery Division for the purpose of securing payment of her annuity. Probably in consequence of a slip the decree did not include the lands of Kilmalanophy, and the defendant remained undisturbed in his possession. An absolute order for the sale of the lands comprised in the Bentham mortgage had been made in 1878, in the Land Judge's Court, and it was ordered that a receiver should be appointed. On the 1st of January, 1804, a mortgage had been made securing £4320 on all the lands above mentioned except Clonavone, with others; and this mortgage became subsequently the property of the defendant, Rupert Collum.

Considerable confusion arose in consequence of inadequate knowledge in all the parties. The Land Judge directed an inquiry, and the examiner found that the defendant was in possession of certain premises in his capacity of mortgagee, and

that in consequence of his reception of the rents his claim was discharged on the 9th February, 1889, and he was ordered to bring back money paid to him out of Court by mistake before the full facts had been discovered. Madame Poirez died on 1st February, 1907, and her husband as her executor continued the proceedings. The sum of £6000 or thereabouts was paid to Madame Poirez or her executor on foot of this annuity. The last payment was made in 1908. The lands of Kilmalanophy have contributed nothing in respect of the annuity or the mortgage for £541. Since 1895, all the rents of Clonavone have been applied by the receiver in paying the arrears of the annuity. With this exception everything has been paid out of lands upon which the plaintiffs are mortgagees.

Now *prima facie* all the lands subject to the prior charges ought to contribute according to their value. The deed of the 12th February, 1874, contains, however, the covenant that the lands were free from incumbrances. As between these lands and the other lands of the grantor subject to the incumbrances, this amounts in law to a covenant of indemnity, exonerating Clonavone and Kilmalanophy, and throwing the charges on the other lands mortgaged by the indenture of 17th February, 1874. That would certainly be the case so long as these other lands were the property of the grantor. But when these other lands pass into the hands of a purchaser for value without notice, does the indemnity continue?

It is admittedly the law that if a mortgagor deals with part of an estate mortgaged for value, and gives the purchaser a covenant against incumbrances or a covenant for further assurance, the purchaser is entitled to be indemnified against the mortgage debt, and to throw it upon the rest of the property mortgaged so long as that property remains in the hands of the mortgagor, or volunteers under him.

But we must go a step further. Supposing the indemnifying property passes, as it has done here, into the hands of a purchaser for value without notice, what happens? On the point we find a conflict of judicial opinion, some Judges holding that the indemnifying lands, even in the hands of a purchaser for value without notice, must continue to indemnify the lands first granted. Others

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hold that both sets of premises must contribute according to their respective values.

This latter view is strongly supported by the reasoning of Lord Justice Turner in *Stronge* v. *Hawkes* (1). The grantee in the first deed has not taken, as he might have done, a direct charge on the other estates. He is content with a covenant; he has left the mortgagor at liberty to deal with these other estates. In this case Mrs. Bentham, the owner of the mortgage created by the deed of 17th February, 1874, had no means of finding out anything about the covenant in the earlier deed. The earlier deed was not registered at the time. Even if the memorial had been found, there is no mention in it of the covenant against incumbrances.

If defendant's contention were correct, the registration system would be altogether an inadequate protection to a purchaser. He would be bound to make enquiries as to all lands subject to charges borne in common with the lands he is purchasing, if they had ever been the property of one owner. Even then, though a search might disclose the memorial of a deed dealing with some of the property, he might get no notice of an equity arising upon a covenant contained in the deed. The case of *Barnes* v. *Racster* (2) fully supports the view taken by Lord Justice Turner. I am, therefore, of opinion that the property passing under the deed of 12th February, 1874, must contribute its proper proportion notwithstanding the covenant.

The next question is, whether any of the Statutes of Limitations affect the matter. Two sections are relied on: first, the 42nd section of 3 & 4 Wm. 4, c. 27, which enacts that no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent shall be recovered for more than six years. This is not a suit for arrears of rent or of interest; it is a suit to compel contribution, and is therefore unaffected by the section. Neither does section 20 of 16 & 17 Vict. c. 113 affect the case. Either the plaintiffs stepped into the shoes of the joint tress, who was never barred, as she was always receiving moneys on account from some of the lands charged, or the plaintiffs' cause of action arose when

(1) 4 D. & J. 632. (2) 1 Y. & C. Ch. C. 401.

they were compelled to pay the moneys due to the jointress, and some of these were paid so late as 1908. I am of opinion that there is no defence to the plaintiffs' demand, and will make a decree in the terms required in the statement of claim.

Solicitors for the plaintiffs: *William Fry & Son.*
Solicitors for the defendants: *Falls & Co.*

D. M. S.

BLAKE *v.* BLAKE.

Marriage articles—Tenant in tail—Nature of estate settled—Post-nuptial settlement—Usual clauses in settlement—Hotchpot clause—Cross-remainders—Election.

By marriage articles, B., the intended husband, being entitled as tenant in tail in remainder to three estates, the Menlo, Waterview, and Puxley estates, covenanted to convey to trustees all real estate to which he was, or during the coverture should become, entitled in fee tail in possession or remainder for all such estate as he could convey therein. It was thereby declared that the trustees should stand seised of all such real estate on trust for B. for life with remainder to C., the intended wife for life for her separate use without power of anticipation. And it was also declared that, after the said life estates, the trustees should stand seised of all such real estate with remainder to the child or children or remoter issue of the said intended marriage, or any or either of them, in such manner as B. should, by the settlement to be made, appoint. And it was further agreed that the settlement should contain all powers, provisions, clauses, and agreements, as are usually inserted in marriage settlements as B. should by the settlement agree to. By post-nuptial settlement B., with the consent of the protector and the concurrence of C., disentailed the Menlo estate and conveyed it to the trustees of the articles on trust after his own life estate to raise a jointure for C., and £2000 for portions for younger children as B. and C. should appoint, and, subject thereto, to the eldest son in tail. In execution of that power B. and C. jointly appointed the £2000 among three children to be raised after the death of the husband, and in priority to the wife's jointure.

By a subsequent disentailing deed B. disentailed the Waterview estate to his own use, and did not re-settle it. By his will he purported to leave it absolutely to C.

B. died without disentailing the Puxley estate, and the next tenant in tail, the eldest son of the marriage, subsequently disentailed.

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Held—(*a*) that the articles settled a voidable estate in fee-simple in all the estates; that as regards the Menlo estate, the effect of the disentailing deed and re-settlement was to capture the fee-simple of the estate for the trusts of the marriage articles, and that the settlement must be disregarded so far as it was inconsistent with the articles.

(*b*) That a hotchpot clause, and a clause providing for cross-remainders, should, in view of the provisions contained in the articles, be read into the articles.

(*c*) That the attempt in the settlement to give the portions term priority to the wife's life estate, and to cut down her life estate to a jointure, was void as being inconsistent with the articles.

(*d*) That the Waterview estate was captured by the articles on the execution of the disentailing deed.

(*e*) That the Puxley estate was not captured by the articles, the settlor having died without executing a disentailing deed, but that the eldest son who disentailed, if he elected to take under the settlement and articles, must bring in the Puxley estate as if he had disentailed it to the uses of the articles, and must also bring the value of his tenancy in tail in the Menlo estate into hotchpot.

ORIGINATING SUMMONS for the determination of questions arising under articles of settlement executed on the marriage of Sir Valentine and Lady Blake, and the settlement executed pursuant thereto.

The facts sufficiently appear by the judgment of Mr. Justice Barton.

Sweetman, for Lady Blake :—

As to Menlo—Where there is a covenant to settle lands, of which the covenantor is tenant in tail, in marriage articles which do not operate as a disentailing deed, then a voidable estate is created : *Coote* v. *Gordon* (1) : Fines and Recoveries Act (4 & 5 Wm. 4, c. 92, sect. 36). On the execution of a disentailing deed, even to other uses than those of the articles, the lands are then captured by the trusts of the articles; and the uses to which they are settled in the disentailing deed are void so far as inconsistent with the articles : Carson's Real Property Statutes, 2nd ed., p. 294. The provision in the Menlo settlement of the 3rd September, 1864, purports to take away the widow's life estate, and give her instead a jointure, and to make the charge for younger children raisable

(1) I. R. 11 Eq. 180, 279.

on the death of the husband. These provisions are void as being in derogation of her life estate, and, accordingly, she gets an immediate life estate notwithstanding. As regards Waterview, though the widow has been left it absolutely by the will of Sir V. Blake, I admit that it also on the execution of the disentailing deed became subject to the articles, and therefore she can only claim a life estate therein.

With regard to the Puxley estate, the articles and the Menlo settlement must be read as one, and if Sir Thomas Blake elects to take a share of Waterview under the articles as one of the children of the marriage, and Menlo under the settlement made in pursuance of the articles, he must bring in the Puxley estate as if it had been disentailed and re-settled to the uses of the articles, for the covenant in the articles to settle, notwithstanding the Fines and Recoveries Act, sect. 38, creates an estate in equity though voidable: *Coote* v. *Gordon* (1); *Mosley* v. *Ward* (2); *Honywood* v. *Forster* (3).

With regard to the class to take in remainder after the death of the husband and wife; each child acquired a vested interest at birth, subject to be divested by appointment by the husband: *Wilson* v. *Duguid* (4). The remoter issue would only take *per stirpes* as representing their parents. The widow is entitled to the shares of those children who predeceased the husband intestate and unmarried, since she is his residuary legatee and devisee.

Oulton, K.C., for the children of Florence Annie Castle, a deceased daughter, to whom £500, portion of the £2000 charge, had been appointed:—

The articles provided for all the usual clauses in settlements. A usual clause is to enable a charge to be raised with the consent of the tenant for life. The appointment is with the consent of both Sir V. and Lady Blake, who executed the deed. Therefore the widow's life estate is puisne to the charge.

The class who take are the children and remoter issue of deceased children living at the death of Sir V. Blake, the

(1) I. R. 11 Eq. 180, 279.
(2) 29 Beav. 407.
(3) 30 Beav. 14.
(4) 24 Ch. D. 244.

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appointor: Farwell on Powers, 2nd ed., p. 475. The remoter issue take *per stirpes* as pointed out by the word "or."

A hotchpot clause is a usual clause, and must be read in (*Miller* v. *Gulson* (1)).

E. L. Julian, for the children of Maud Julia Cartwright, a living daughter:—

A clause that portions are raisable on the death of the settlor is a usual one: Vaizey on Settlements, p. 1123. A clause restraining a married woman from anticipation does not exempt her from the ordinary consequence of acquiescence: White and Tudor's Leading Cases on Equity, 8th ed., vol. 1, p. 764; *Derbishire* v. *Home* (2). Here the widow actually joined in both the settlement of the 3rd September, 1864, and the appointment, thus showing that she contemplated this clause when executing the articles. It is also a usual clause to raise portions during the life of the tenant for life with his consent: *Wright* v. *Wright* (3). The onus of showing that the deed of the 3rd September, 1864, is invalid, lies on the person impeaching it. The class to any of whom the husband could have appointed were the children or remoter issue born during his life. The class who take in default of appointment are all those to whom he could have appointed, and who were living at his death, who take *per capita*: *Inch* v. *Hollingsworth* (4); *Re White* (5); *Heron* v. *Stokes* (6); *Re Patterson* (7); *Fletcher* v. *Fletcher* (8).

S. L. Brown, K.C., for Sir Thomas Blake:—

It is clear that the Puxley estate is not captured by the articles in the ordinary way, because once the tenant in tail dies without having disentailed, it cannot be captured. Further, it is not caught by the doctrine of election. Sir Thomas Blake did not take the Menlo estate under the articles; the only thing which was comprised in the articles was the tenancy in tail. He took the fee-simple under the disentailing deed and re-settlement.

(1) 13 L. R. I. 408.
(2) 3 De G. M. & G. 80.
(3) [1901] 1 I. R. 360.
(4) 21 Beav. 112.
(5) Johns. 656.
(6) 2 Dr. & War. 89; 12 Cl. & Fin. 161.
(7) [1899] 1 I. R. 321.
(8) 9 L. R. I. 301.

As to the class of children to take—a clause providing for cross-remainders between all the children is a usual one (2 Key and Elphinstone's Conveyancing, 6th ed., *sub tit.* Settlements), and should be read into the articles. *Barton, J.* 1913. BLAKE v. BLAKE.

Sweetman, in reply.

BARTON, J.:— March 13.

The articles, dated the 25th June, 1864, and executed in contemplation of the marriage of Valentine Blake and Camilla Eugenea Combe, were framed in inartistic and ungrammatical language. But it is possible to extract from them five provisions which are relevant and material for the purpose of the present case. They were as follows:—(1) Valentine Blake, in consideration of the intended marriage, covenanted to convey to the trustees, their heirs and assigns, all real estate, to which he was, or during the coverture should become, entitled in fee tail in possession or remainder, for all such estate as he could convey therein. (2) Valentine Blake covenanted to do and execute all deeds and things necessary for barring any estate tail in the said real estate or any part thereof. (3) It was declared that the trustees should stand and be seised of all such real estate upon trust for Valentine Blake for life, with remainder to his intended wife, Camilla Eugenea Combe, for life, for her separate use, without power of anticipating the rents and profits. (4) It was declared that after these life estates to the intended husband and wife the trustees should stand seised and be seised of all such real estate, "with remainder to the child or children or remoter issue of the said intended marriage, or any or either of them, to the exclusion of the other or others of them, or in such manner as he the said Valentine Blake may appoint, as the said Valentine Blake shall by the settlement to be made for the purpose of carrying these presents into effect agree to." (5) It was further agreed that the settlement should contain "all powers, provisions, clauses, and agreements as are usually inserted in marriage settlements, as he, the said Valentine Blake, may by the settlement to be made for carrying these presents into effect agree to."

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At the date of the execution of these articles Valentine Blake was entitled as tenant in tail in remainder to three estates—(1) the Menlo estate, (2) the Waterview estate, and (3) the Puxley estate. The marriage was solemnized upon the 25th June, 1864, after the execution of the articles.

In the first place, I take the Menlo estate. By deed of post-nuptial settlement, dated the 3rd September, 1864, Valentine Blake, with the consent of his father Sir Thomas Blake as protector, disentailed the Menlo estate, and proceeded to convey it to the trustees named in the articles. But, although the articles were recited, the settlement entirely disregarded them. Instead of the life estate, which had been stipulated for in the articles, a jointure of £200 a year was charged upon the lands in favour of the wife. Provision was made for raising, after Valentine Blake's death, £2000 for portions for younger children, in such manner as Valentine Blake and his wife jointly, or in default as the survivor, should appoint. By deed of appointment, dated October the 25th, 1904, Valentine Blake and his wife appointed £2000 among three children of the marriage, to be raised after the death of Valentine Blake, and in priority to Mrs. Blake's life estate.

The wife (now Lady Blake) was restrained from anticipation, and this settlement was ineffectual to cut down her rights under the articles. The articles created a "voidable estate" for life in her favour, and upon the execution of the deed disentailing the lands of Menlo, her life estate was confirmed and let in on these lands: *Coote* v. *Gordon* (1).

Her life estate in the Menlo lands takes priority of the portions for younger children. It was contended that a power of appointing portions raisable with the consent of a tenant for life would have been a usual power to have inserted in the settlement. Whether it would be so or not, it was inconsistent with the clear life estate for the wife stipulated in the articles, and she could not consent to that life estate being postponed, being restrained from anticipation. On the other hand, I am of opinion that the usual clauses, powers and provisions which were contemplated by the articles would include a hotchpot clause: *Miller* v. *Gulson* (2).

(1) I. R. 11 Eq. 180, 279. (2) 13 L. R. I. 408.

As regards the Waterview lands, Sir Valentine Blake disentailed them by a deed of 10th July, 1877, but did not re-settle them. Lady Blake's voidable life estate was confirmed, and let in by the disentail. These lands were devised to Lady Blake by her husband, but he had no disposing power over them, and she must be satisfied to take a life estate only in them.

As regards the Puxley estate, Sir Valentine Blake did not disentail that estate; and the present tenant in tail, Sir Thomas Blake, is not bound by the articles. But Sir Thomas Blake takes benefits under the articles, and he is put to his election. He cannot take the estate tail in the Menlo lands, and other benefits under the articles, without giving effect to the life estate in the Puxley estate which Lady Blake was intended to receive under the same articles.

There remains the question, what class of persons, under these articles, take the Waterview and Puxley estates under the "remainder" after the parents' life estate to "the child or children or remoter issue" of the intended marriage? This remainder is not in a familiar form; and the difficulty is how to give effect to the peculiar words of the articles, in the events which have happened, and in the absence of any settlement executing the articles. It was contended on behalf of the widow that the children, who predeceased Sir Valentine Blake unmarried and intestate, acquired vested shares, which have passed to her under her husband's will or otherwise. But, in view of the peculiar language of the articles, I am of opinion that, in drawing a settlement, such a result would have been obviated by the introduction into the settlement of cross-remainders. It was contended on behalf of the grandchildren that they are entitled *per capita* and *pari passu* with the surviving children of the marriage. But, in drawing the settlement, that would, I think, have been obviated by giving effect to the word "or," which is used in a substitutional sense. Accordingly, I am of opinion that the class of persons entitled to these estates, subject to Lady Blake's life interest, are the children living at the death of Sir Valentine Blake, and the grandchildren living at his death whose parents predeceased him, such grandchildren taking *per stirpes*, and equally *inter se*.

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The case again came before the Court upon the minutes of judgment.

The question arose as to whether Sir Thomas Blake should bring into hotchpot his tenancy in tail in the Menlo estate as well as his share of the Puxley and Waterview estates.

S. L. Brown, K.C., for Sir Thomas Blake :—

There is no case in the books in which the eldest son had to bring his estate tail or fee-simple into hotchpot; to do so would put him in the same position as one of the younger children, which was never intended.

Oulton, K.C., for one of the other children :—

Equality is equity. The principle of hotchpot is that equality is equity. There is no preference given by the articles to the eldest son. It has been decided that a hotchpot clause is a usual one: *Miller* v. *Gulson* (1). The fact that the property is real estate is immaterial. The settlement could be carried out by way of trust for sale.

E. L. Julian, for another child :—

There can be no logical distinction between real estate and personalty in application of the principle on which hotchpot clauses are founded. In Prideaux's Conveyancing, 20th ed., vol. ii, p. 580, there is a hotchpot clause by which real estate is to be brought in; so it is proper conveyancing to insert such a clause, even without a trust for sale.

May 5.

BARTON, J. :—

A further question arises, must Sir Thomas Blake bring into hotchpot the estate tail which he acquired in the Menlo land under the post-nuptial settlement of September 3rd, 1864? If a settlement of the other estates had been made giving Sir Thomas

(1) 13 L. R. I. 408.

Blake an estate tail in them also, it could not be suggested that he could be affected by any hotchpot clause ; and a settlement of that kind would be a usual and natural settlement where there are family estates and a title of honour concerned. In that case the hotchpot clause would affect only the younger children's portions. But there was no settlement of the other estates, and it is a case of a partial appointment to one of a number of children who, in default of appointment, are entitled equally.

If real estate is by settlement to be divided equally among a class, it is usually carried out by a trust for sale and distribution, but not necessarily or always. Whether carried out by a trust for sale and distribution or otherwise, a hotchpot clause would be a proper clause in such cases ; and I see no reason why in this particular case, where under the articles Sir Thomas is in no better position than the others, and there has been a partial appointment, he should not bring the value of his estate tail into hotchpot.

Solicitors for Lady Blake and Sir Thomas Blake : *E. & G. Stapleton.*

Solicitors for Cartwright and Castle minors : *Franks & Oulton.*

E. C. F.

Appeal 1913.
Feb. 20, 22.
April 1.

IN THE MATTER OF THE COMPANIES (CONSOLIDATION) ACT, 1908; AND IN THE MATTER OF THE IRISH PROVIDENT ASSURANCE COMPANY, LIMITED; AND IN THE MATTER OF JOHANNA BRADLEY (1).

Company—Winding up—Companies (Consolidation) Act, 1908 (8 *Edw. 7. c.* 69), *section* 215—*Misfeasance—Company purchasing its own shares—Compromise of managing director's claims*—Ultra vires—*Loss to company—Breach of trust—Statute of Limitations—Conversion—Trustee Act*, 1888 (51 *& 52 Vict. c.* 59), *section* 8 (1).

The misfeasance section (215) of the Companies (Consolidation) Act, 1908, creates no new right, and only provides, as did section 165 of the Companies Act, 1862, a summary procedure for enforcing against directors or other officers of a company liability for breach of trust or other misconduct which, prior to the Act, might have been enforced by action; and to bring a case within the section it is essential to show that pecuniary loss resulted to the company from the acts or defaults constituting the alleged misfeasance. *In re Canadian Land Reclaiming and Colonizing Company; Coventry and Dixon's Case* (14 Ch. D. 660, 668) followed, *Cavendish Bentinck* v. *Fenn* (12 A. C. 652) applied.

It is *ultra vires* for a company to purchase its own shares, or to advance capital of the company to a director to do so. *Trevor* v. *Whitworth* (12 A. C. 409) applied.

A *bona fide* compromise of reasonable claims made by a Managing Director against the company, by payment of a sum of money out of capital of the company, is not illegal.

Where a policy-holder surrendered his policy to the Insurance Company on the terms that the amount paid to him for the surrender should be invested in shares of the company:—

Held, by Palles, C.B., affirming the decision of Barton, J., that this was a conversion within section 8, sub-section 1, of the Trustee Act of 1888, which would prevent the policy-holder, a director, from setting up the Statute of Limitations as a defence.

A *bona fide* transaction with a company impeachable only on the ground of being *ultra vires*, will be set aside only on the terms that both parties be restored to their original rights.

APPEAL by F. C. Norman and Edwin Cooper, from an order of Barton, J., dated the 14th November, 1912, whereby it was

(1) Before PALLES, C.B., and HOLMES and CHERRY, L.JJ.

amongst other things, ordered that the said F. C. Norman and Edwin Cooper were respectively liable to contribute to the assets of the company the respective sums in said order afterwards mentioned with interest as thereinafter mentioned, being the amounts respectively paid by the company, and received by them respectively on foot of certain single premium policies, which payments were *ultra vires* the memorandum and articles of association of the company, that is to say, F. C. Norman, the sum of £242, with interest at 4 per cent. per annum from the 7th August, 1901, until date of payment, and the said Edwin Cooper the sum of £220, with interest at 4 per cent. per annum till date of payment; and that the said F. C. Norman is liable to contribute to the assets of the company the amount actually received by him on foot of a dividend paid on the preference shares on the 18th May, 1904, namely £49 10*s.*, with 4 per cent. interest from the 18th May, 1904, until payment; and that the said F. C. Norman is liable to contribute to the assets of the company the sum of £686 as compensation for his misfeasance and breach of trust in receiving a sum of £686 on the 20th January, 1905, in part payment of a present, bonus, or compensation, inasmuch as such payment was *ultra vires* the powers of the company and contrary to law, and represents capital of the company appropriated by the said F. C. Norman without authority, and that the said F. C. Norman be at liberty to apply in the liquidation matter for a return of certain shares in the said company, and that pending said application no proceedings be taken to compel payment of said sum of £686, such application to be made within six weeks of the entry of the order, and to pay to the liquidator the costs incidental to the claim of the company in respect of a sum of £2000 mentioned in paragraph No. 5 of the notice of motion, of which the said sum of £686 formed part.

The company was registered in Ireland on the 6th December, 1900. Its primary objects, as appearing by the Memorandum of Association of that date, being, *inter alia*, to carry on and develop all kinds of Insurance business, excepting the issue of policies of insurance upon, or in any way relating to, human life. The memorandum did not empower the company to purchase its own

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shares. The first directors were Frederick Charles Norman (who was subsequently at the first ordinary general meeting, held on the 4th April, 1901, appointed Chairman and Managing Director), Arthur J. Hardy, and Cæsar H. Woodhead. For many years before the formation of the company F. C. Norman had been manager of a Friendly Society called the Irish Provident Friendly Society, which did a large and successful business, subject to the limits of the Acts controlling it; and it was mainly to expand the business of this society that the present company was formed.

Early in 1901 the company commenced business, utilizing the agents and organizations of the Friendly Society. The principal classes of business which they carried on were house purchase, fire insurance, third party and seamen's effects insurance, and the insurance in one of the forms of Endowment Assurance known as bond investment. By bond policies, the company, in consideration of annual premiums, agreed to pay the assured a capital sum at the expiration of a fixed period from the date of the policy, or, in case the assured should die during the period, a certain percentage of the premiums should be repayable to the representatives of the assured. The main difference between a bond policy and an ordinary endowment policy is, that under the former a percentage of the premiums only is repayable to the representatives in case of the insured dying during the specified period, while in the latter the whole capital sum or part thereof is repayable. By means of rather complicated transactions, unnecessary to be stated in detail, the company at the start of its activity took over all the business of the Friendly Society as to these bond policies, and all the assets of the society, together with all the society's liabilities in respect thereof. This turned out extremely profitable, and from a table prepared by the liquidator, Mr. John Gordon, it appeared that during nine years up to 31st December, 1910, £518,404 9*s.* 11*d.* was received in premiums, and £180,741 7*s.* 11*d.* was paid in claims. The company did not deposit £20,000 with the Accountant-General of the Court of Chancery, as required by the Life Assurance Companies Act, 1870. In an action of *Foal* v. *Irish Provident Assurance Co.* (1) the Court of Appeal held on the 27th July, 1910, reversing the decision of Meredith, M.R., that

(1) 46 I. L. T. R. 214; [1912] 2 Ch. 597, note.

the bond policies were *ultra vires*, unauthorized by the Memorandum of Association, incapable of ratification, and that the premiums paid were repayable to the policy-holders on the ground of a total failure of consideration. The English Court of Appeal subsequently arrived at a decision to the same effect. An appeal to the House of Lords was taken by the Company in *Flood's Case* (1), but withdrawn to allow of a winding-up with a view to the transfer of the business of the company.

On the 9th February, 1898, F. C. Norman and his wife, in consideration of two sums of £100 each paid by Norman to the Friendly Society (then in existence), obtained from the society two bond policies, Nos. 2 and 4, on their respective lives, whereby the society secured payment of £150 each to Norman and his wife, Alice M. Norman, respectively, at the end of eight years. On the 7th August, 1901, the company paid Norman £242, the surrender value of these policies, and took an assignment of them to a trustee for the company. No cash was paid, but the company issued shares of the value of £242 taken at par, it being alleged that this was in pursuance of the company's contract with the society for the taking over of the society's assets and liabilities. A precisely similar transaction took place on the same date between the company and Edwin Cooper, then a director of the company, and his wife, Elizabeth Cooper, in respect of two bond policies issued to them by the society, Nos. 13072 and 13073, on their respective lives, £220 being paid to them in shares in the company as the surrender value.

By indenture, dated the 20th January, 1905, between the said F. C. Norman of the one part, and the company of the other part, reciting an agreement, dated 20th April, 1904, between the company and Norman, whereby Norman was appointed managing director for twenty-five years at the salary therein mentioned (2), with the stipulation that if, before the expiration of twelve years,

(1) 46 I. L. T. R. 214; [1912] 2 Ch. 597, note.

(2) £10 weekly until the annual premium income of the company reached £50,000; from thence until £80,000 was reached £12 10*s.* weekly; from thence until £100,000 was reached £15 weekly, when his weekly salary should be £20; also he was to be entitled to 2½ per cent. payable monthly on all collections above £100,000.

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the company should be wound up, or if, for any reason other than Norman's death or resignation, his tenure of the office should be determined, the company should pay him £10,000 as liquidated damages, and that it was declared (by the agreement of 1904) that this figure was fixed, having regard to Norman's instrumentality in building up the business of the company, and capacity for further advancing the company's interests; and reciting that Norman was owner of 686 fully paid up £1 shares in the company, and was also manager of the Irish Provident Friendly Assurance Society, which was an adjunct to, and carried on in connexion with, the company, and that differences had arisen between Norman and certain of his co-directors of the company with reference to his conduct as managing director in reference to the affairs of the company, and that actions were pending in England and Ireland brought by these parties and the company against Norman, and that it had been agreed that these differences should be settled, and the proceedings in the actions stayed on the terms therein set forth, including the payment theretofore previously made by the company to Norman of £2000, it was agreed—

(*a*) That Norman should resign his position of managing director of the company, and manager of the society, and of director of both.

(*b*) That he should hand over to the company all books of accounts, registers, &c., and all documents, property, or effects in his possession, custody, or power belonging to the company or the society.

(*c*) That he would, without further payment, transfer to the company all shares in the company of which he was then possessed, or legally or equitably entitled to.

(*d*) The company agreed to stay the actions, each party bearing his or its own costs.

(*e*) Norman released the company from the £10,000 mentioned in the agreement of the 20th April, 1904, and every part thereof, and from all claims and demands under said agreement.

(*f*) Norman covenanted with the company and with the society not to circularize, solicit, or transact assurance business of any kind or description, as then carried on by the company, or deal with any of the policy-holders, members now or hereafter to

be on the books of the company, or any of the past or the present district or other managers, superintendents, agents, collectors, or other officials, or with any policy-holders, members, or persons then or theretofore on the books of the society, or any of the past or present managers, superintendents, agents, collectors, or other officials or connexions of the society.

(*g*) That Norman would not, in Ireland, during a period of five years from the date of the said release, and would not, in England, Scotland, or Wales, during a period of one year from the date thereof, carry on, or directly or indirectly be interested in the promotion, formation, establishment, or carrying on of any company, syndicate, partnership, or business having for its object the transaction of life assurance business, endowment business, separately from or combined with house-purchase business, as now carried on by the company, or any other business at present carried on by the company.

This release was executed by the company (under seal) and by Norman.

On the 29th February, 1912, Mr. John Gordon, liquidator of the company which was being wound up, served notice of motion seeking, *inter alia*—

(1) That Norman, Cooper, and four other directors should be declared liable to contribute to the assets of the company all sums paid away for purposes *ultra vires* the memorandum and articles of association, namely, all sums paid by them in carrying on life assurance business; for an account of the sums so paid, and payment of the same with interest at 4 per cent.

(2) That Norman, Cooper, and a director named Hardy be declared liable to contribute to the assets of the company the sum of £1669, with interest at 4 per cent., as compensation for their misfeasance and breach of trust in payment to the said Norman of the sum of £242, and in payment to said Hardy, Cooper, and others, of sums amounting to £1427, inasmuch as the payment to Norman of said sum of £242 was contrary to law and in breach of trust, he, the said Norman, alleging that he was personally entitled to receive, and did receive, such sum as the surrender value of the said two policies mentioned (*ante*, p. 355); and as

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regards the balance, viz., £1427, that Cooper and Hardy in they ears 1898 and 1900 received part thereof themselves, and consented to or allowed the payment of the remainder of said sum to others as the alleged surrender values of certain other single-premium policies issued by the company. On this notice of motion the order appealed from was made.

H. Wilson, K.C., and *S. Moore*, for the appellant, Norman :—

If the transaction complained of were a mere misfeasance, the Statute of Limitations would be a defence. But Barton, J., held that there was a conversion within section 8, sub-section (1), of the Trustee Act, 1888 (51 & 52 Vict. c. 59). Yet these dealings, even if *ultra vires*, were honest in intention ; and in no way can the property be held to have been converted by Norman to his own use: *In re Lands Allotment Co.* (1) ; *In re Gurney, Mason* v. *Mercer* (2) ; *Hiort* v. *Bott* (3) ; *In re Turner, Barker* v. *Ivimey* (4). Under the Companies Consolidation Act, 1908, 8 Edw. 7, c. 69, sect. 279, where proceedings are taken against a director for negligence or breach of trust, the Court, if of opinion that though liable he acted honestly and reasonably, may relieve him from liability on such terms as it should think fit. The present proceedings have been instituted under section 215 of that Act. That section is in terms the same as section 165 of the Companies Act, 1862, which was held to have introduced no new right, but only a summary mode of procedure: *In re Canadian Land Reclaiming and Colonizing Co., Coventry and Dixon's Case* (5). Furthermore, the breach of duty or misfeasance within the section, to entitle the applicant under it to relief, must be shown to have resulted in loss to the funds and assets of the company: *Cavendish Bentinck* v. *Fenn* (6), *per* Lord Herschell, pp. 661, 662; *per* Lord Macnaghten, p. 669. Here, as regards the single-premium policies, the company were liable to the extent of the assets of the society to satisfy the claims on the society. The society was perfectly solvent at the time the company took over their business, and the assets

(1) [1894] 1 Ch. 616.
(2) [1893] 1 Ch. 590.
(3) L. R. 9 Ex. 86.
(4) [1897] 1 Ch. 536.
(5) 14 Ch. D. 660.
(6) 12 A. C. 652.

of the society were ample to answer all their liabilities. According to the view of the evidence taken by Barton, J., in his judgment, the company itself was in 1901, and for several years afterwards, solvent and able to satisfy all claims on foot of policies. The result of the transactions as to the surrenders was, therefore, that the company got rid of liability on foot of policies which would have been paid in full, for shares which are absolutely worthless. The only benefit Norman and Cooper got was one dividend, which they have been ordered to repay. In fact, the company substantially benefited by that surrender, instead of sustaining any loss. If Norman and Cooper were called on to repay the £242 and £220 they got, they were at all events entitled to have the policies returned and revived, with a view to enforcing their rights under them against the assets of the Friendly Society.

Next, with respect to the £2000 paid to Norman in January, 1905. It is not disputed, and Barton, J., fully recognized, that there was full consideration for its payment in the claims that Norman released. The only infirmity in this transaction was the resignation by Norman of his position as manager and director of the society, which, it is suggested, the company were not entitled to obtain by money paid out of the capital of the company, and the assignment of the 686 shares. Here again no loss is or could be proved to have resulted to the company. Substantial claims were discharged, lawsuits were settled, and the company got these shares, whatever their value might be. If there was no loss, the proceedings under the misfeasance section must fail. Again, there is the difficulty of dividing the consideration. But, assuming that Norman is liable to repay the £2000 or any part thereof, on what terms is the order to be made? Where a transaction is declared void on the ground of *ultra vires*, the parties must be replaced in the positions they previously occupied. Barton, J.'s, judgment is altogether one-sided. He sets aside, in favour of the company, the agreement as to the transfer of the shares, and leaves all the other clauses, burdensome and harassing though they be, binding on Norman. That surely is not in accordance with equitable principles.

M'Gusty, for Mr. Cooper.

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Serjeant Matheson, K.C., and *A. A. Dickie*, for the respondents :—

The claim of the liquidator against these directors is for involving the company in unauthorized trading. In making the order appealed from, Barton, J., was simply adhering to perfectly well-established principles. The £242 was paid by Norman as managing director to himself as policy-holder. As regards the agreement to invest the money in shares of the company, that was altogether illegal. It was an application of the capital of the company to enable a director to purchase its shares: *Trevor* v. *Whitworth* (1). There was a clear conversion as held by Barton, J., so the Statute of Limitations is not applicable. The payment of the £2000 was also illegal. *Coventry and Dixon's Case* (2) was cited on the other side. There the misfeasance charged was acting as directors without holding the number of shares requisite to qualify them for the office under the articles of association. Jessel, M.R., held that they were liable to contribute to the assets of the company £500, being the value of the qualifying shares. The directors so charged appealed, and the order of the Master of the Rolls was reversed; but on what grounds? James, L.J., says, at p. 670: "Now, what is the wrong done? It is said that they acted as directors, but it is not pretended that any damage resulted to the company from what they did while so acting as directors, for they only joined in acts for which every other director who was present and joined in them would have been equally liable." The agreement here was with Norman as managing director. He sat with the board and voted the money to himself. The agreement was *ultra vires*. The covenants by Norman not to carry on insurance business were worthless, because since *Flood's Case* (3) the company could no longer engage in it. A company cannot by any device purchase its own shares: *Trevor* v. *Whitworth* (1); *In re Anglo-French Co-operative Society, Ex parte Peilly* (4). Although Barton, J., may have been right in not charging Norman with the whole of the £2000, the learned Judge was

(1) 12 A. C. 409.
(2) 14 Ch. D. 660, 668.
(3) 46 Ir. L. T. R. 214; [1913] 2 Ch. 597, note.
(4) 21 Ch. D. 492.

certainly right in holding him liable for the 686 shares at their par value, in the absence of any evidence that they were worth less.

H. Wilson, K.C., in reply :—

There can be no apportionment of the consideration for the release of January, 1905: *Chanter* v. *Leese* (1); *Cummings* v. *Stewart* (2). The company's shares are now admittedly of no value except for the purpose of voting.

PALLES, C.B. :— April 21.

This is an appeal by Frederick C. Norman and Edwin Cooper, two of the late directors of this company, now in liquidation, against portions of an order of Barton, J., made upon an application by the official liquidator, under section 215 of the Companies (Consolidation) Act, 1908, commonly called the misfeasance section, which is a re-enactment of section 10 of the Companies (Winding-up) Act of 1890.

Eight questions were decided by Barton, J., on this application, which involved the liability of six different persons who had been directors of the company; but the limited appeal before us involves the re-consideration of two only of those eight questions, and the liability in respect of the first of these questions of two only of those six persons, viz., Mr. Norman and Mr. Cooper, and, in respect of the other of those questions, of Mr. Norman alone. Of the many facts which were necessarily dealt with below, I shall confine myself strictly to those relevant to the two questions for our decision.

The first portion of the order appealed from is a declaration that Mr. Norman is liable to contribute to the assets of the company the sum of £242, and Mr. Cooper the sum of £220, with interest from the 7th August, 1901, such principal sums being the amounts paid by the company, and received by them respectively, on certain single-premium policies, which payments were declared to be *ultra vires* the Memorandum and Articles of Association.

The company was incorporated on the 6th December, 1900. Its objects, as stated in the Memorandum of Association, were,

(5) 4 M. & W. 295; 5 M. & W. 698. (6) [1913] 1 I. R. 95.

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inter alia, to establish, carry on, acquire, and develop the business of Assurance Companies, "and such other business of any kind except the issue of policies of assurance upon or in any way relating to human life"; to issue bonds or other securities of the company payable at such times as the company might think fit, subject to a proviso "that nothing herein contained shall authorize the company to grant annuities or assurances on human life"; and to acquire the whole or any part of the business, assets, and liabilities of any company carrying on any business of a similar character to that which the company was authorized to carry on.

At the time of the incorporation of the company there was an existing society—the "Irish Provident Friendly Assurance Society"—which was entitled to carry on, under certain limits, Life Assurance business, and which had issued the single-premium policies of assurance referred to in the portion which I have read of the order appealed from, by each of which, in consideration of £100 actually paid, the society contracted to pay that sum within three months after the death of the insured, with the proviso that, in the event of the insured living eight years from date, £150 should become payable. Of these policies, four are relevant to the matter of this appeal. Of these, one, dated 9th February, 1898, was on the life of Mr. Frederick C. Norman. A second, of the same date, was on the life of his wife, Mrs. Alice M. Norman. A third, dated 18th December, 1899, was on the life of Mr. Edwin Cooper; and the fourth, of the same date, was on the life of Mrs. Elizabeth Cooper, the wife of Edwin Cooper.

On the 12th June, 1901, a resolution of the Board of Directors was passed "that the whole of the endowment business of the Irish Provident Friendly Assurance Society be taken over by the company."

On the 1st July, 1901, applications were made by Mr. Frederick Norman that the two policies with the Irish Provident Friendly Assurance Society on the lives of himself and his wife should be transferred to the company; and on the 7th August, 1901, Mr. Norman, then being a director of the company, received from the company the sum of £242, for all claims on foot of these two policies. Similarly, on the 26th July, 1901, application was made by Edwin Cooper that the policies with the Friendly Society on

the lives of himself and his wife should be transferred to the company; and on the 7th of August, 1901, £220 was paid out of the funds of the company to Edwin Cooper, then being a director, for all claims on foot of those two last-mentioned policies.

The effect of the words I have read from the Memorandum of Association, excluding from the purposes of the company the issuing of policies "upon or in any way relating to human life," was elaborately discussed and determined in this Court in *Flood* v. *Irish Provident Assurance Company* (1), the effect of the decision in which is admitted to be that the four single-premium policies I have mentioned were policies upon human life. This part of the business of the Irish Provident Friendly Society taken over by the company was, therefore, not "business of a similar character to that which the company was authorized to carry on." The company were not, therefore, authorized to take it over; and the payments to Norman and Cooper were *ultra vires* and breaches of trust by the directors.

The sums mentioned in the declaration of Mr. Justice Barton, appealed from, and which the parties who received them are, by the order, declared liable to contribute, with interest, to the assets of the company, are those actually received by Norman and Cooper; and this declaration and direction are, *prima facie*, right, subject to three questions raised by the appellants: first, that part of the arrangement under which these single-premium policies were paid off was that the sums so paid should be invested in shares of the company, and consequently the liability of the appellants is to return not the money, but the shares; secondly, that the claim of the liquidator is barred by section 8 of the Trustee Act, 1888; and, thirdly, that the entire transaction, of which these payments were part only, ought to have been set aside, with the result that the single-premium policies ought to be declared binding on the funds of the Friendly Society, of which an amount far exceeding the sums in question is traced into the funds of the company now in liquidation, and that thus Norman and Cooper have a cross-claim against that company, equal in amount to the company's

(1) 46 I. L. T. 214; [1912] 2 Ch. 597.

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claim against them in respect of this transaction, and that each claim should be set off against, and would extinguish, the other; or at all events the loss is only the difference.

The first of these defences may be disposed of in a few words. Of the many answers to it, one is, that it would change the transaction into one of the purchase of its own shares, which would be *ultra vires*; the money wrongly paid to the appellants would in that event be treated as money of the company invested by it in its own shares, and this would involve the appellants' liability to bring it back. Another is that the shares were taken by the appellants as investments, which it is sworn in paragraph 27 of the affidavit of 26th March, 1912, were in 1905 "marketable at more than par value," and which I have no doubt were more valuable to the directors than to outsiders, by reason of the voting power they carried with them; but be this as it may, they must be treated as having deliberately taken them, for better or worse. A third is lapse of time.

As to the effect of section 8 of the Trustee Act of 1888, one of the exceptions from the operation of the section is where the proceeding is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and *converted to his own use*. I cannot entertain any doubt that, by investing in his own name in the company's shares the trust moneys received under the policy *in his own name*, Norman converted the moneys he so invested to his own use, within the meaning of the section.

The shares in which the money given for Mrs. Norman's policy was invested were shares in her own name; and had she not held them as a trustee for her husband, the case might have been different; but the agreement of 20th January, 1905, by which he contracts to sell shares, including these very shares, identified by their numbers, to a trustee for the company, and containing a declaration that they were held by Mrs. Norman as a trustee for him, shews that they must be dealt with as if the shares had been issued to him originally; and that investment, as well as his sale in 1905 of the shares to the trustee for the company, were two separate acts of conversion by him of the moneys received by him from the company to his own use, within the meaning of section 8.

The shares issued to Cooper in respect of the £220 received by him from the company, on foot of both the policy on Mrs. Cooper's life as well as on that on his own, were in his own name; and the acceptance of those shares was in my opinion a conversion to his own use within the meaning of the section.

If, then, these payments by the company had been isolated transactions unconnected with the taking over of part of the business of the Friendly Society, I should have been of opinion that this portion of the order of Barton, J., was right. This, however, is not so; and this brings me to the third answer of the appellants to this claim.

The payment of these sums for the surrender of the single-premium policies of the Friendly Society was made under the authority of the resolution of the 12th June, 1901, and would have been *intra vires* and valid had that resolution been *intra vires*. The application to bring back these sums of £242 and £220 impeaches this resolution, and can be grounded only on such impeachment.

Now, very large sums have been received by the company from policy-holders of the Society; and it appears to me to be clear that this company cannot both approbate and reprobate that transaction, and consequently that it must account to the Friendly Society for the sums thus received by the company; and as the claims of Norman and Cooper against the Friendly Society must be deemed to continue to exist against the Friendly Society by reason of the avoidance or repudiation of the contracts of surrender, I am of opinion that they are entitled to stand as creditors against so much of the assets of the Friendly Society as wrongly came into the hands of the Limited Company, these latter sums being, on the case made by the liquidator in the portion of his original affidavit which relates to his first head of claim against the directors, so largely in excess of the total amounts paid under all the single-premium policies surrendered—£2400, I believe, in all—that it would be idle to direct an inquiry as to the amount of those receipts. I therefore hold that decision of Barton, J., who does not appear to have considered this question, is wrong; and I decline to permit the liquidator, at this stage of these lengthened proceedings, to make a new case as to these

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sums, and to seek an expensive inquiry, which in my opinion can result in nothing but the extinguishment of his claim in respect of them; and I am consequently of opinion that, as to these sums, the order of Barton, J., should be reversed.

The only other portion of the order which is appealed against is a declaration that Mr. Norman is liable to contribute to the assets of the company £686 with interest from the 20th January, 1905. This sum is part of £2000, received by Norman out of the assets of the company, in consideration of the execution by him of an agreement of 20th January, 1905.

This agreement was sanctioned by a general meeting of the company; and it is necessary that I should state it in some little detail.

It is made between Norman and the company, and commences with a recital of an agreement of the 20th April, 1904, by which Norman was appointed permanent Managing Director of the company for the term of twenty-five years at a certain salary, and subject to certain terms, including a term that if within twelve years the company were wound up, or if by any other means at any time, except the death or resignation of Norman, his tenure of office should be determined, the company should pay him £10,000, as liquidated damages, and not as a penalty.

It then recites that Norman was the owner or holder of 686 fully paid up shares of £1 each in the company, the numbers of which are stated in the agreement; some of which are stated to be 7½ per cent. preference shares, and some deferred shares; some standing in his own name, and some in the name of his wife, Alice Norman.

It then proceeds to recite that differences recently arose between Norman and certain of his co-directors with reference to Norman's conduct relating to the affairs of the company and his action as its Managing Director, and that proceedings were commenced in the Chancery Division of the High Court in Ireland, against him (Norman), and another, by other directors of the company, and the company itself, claiming, *inter alia*, an injunction against the defendants interfering with or in any way impeding the plaintiffs from entering the company's premises and inspecting the company's books, or from acting as directors of the company; and an

injunction to prevent Norman from acting as director or Managing Director of the company.

There was then a recital of other proceedings by the company and some of its directors in the Chancery Division of the High Court in England, claiming, *inter alia*, an injunction to prevent Norman acting as a director of the company, and certain accounts.

It then recites that Norman was also chairman of the directors of the Irish Provident Friendly Society, of which he was also Manager; under an agreement of the 1st April, 1895, that that Society was an adjunct to, and was carried on in connexion with, the Irish Provident Assurance Company, Limited.

It then contains the following recital :—

"And whereas in order to settle the said differences between the Irish Provident Assurance Company, Limited, and certain of its directors and the said Frederick Charles Norman, and to compromise all questions in dispute between the said company and the last-mentioned directors on the one hand and the said Frederick Charles Norman on the other hand in the said actions, and in view to avoid litigation and also in order to dispose of all claims (if any) which the said Frederick Charles Norman might consider himself entitled to make against the Irish Provident Assurance Company, Limited, under the hereinbefore recited agreement of the 20th April, 1904, or against the said Irish Provident Friendly Assurance Society under the said agreement of the 1st of April, 1895, *it has been agreed*, without prejudice to the contentions of either side in the said actions and disputes, that the said Frederick Charles Norman shall resign his positions as director and Managing Director of the Company, and also resign his positions as director and Managing Director of the Society, and *that he shall also without payment* assign and transfer, or cause to be assigned or transferred, the said and all shares in the company standing in his own name or in the name of any nominee or nominees, or trustee or trustees, for him, and that he shall release the company from all claims in respect of the sum of £10,000 mentioned in the said agreement of the 20th April, 1904, and every other claim and demand there-

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under, and from all claims and demands of any kind or nature whatsoever (if any), which he the said Frederick Charles Norman might make or consider himself entitled to under or by virtue of any prior agreement or agreements, or under or by reason of any resolution or purported resolution of the Board of the Company, and that he shall also release the society from all claims under the said agreement of the 1st April, 1895, and from all claims and demands of any kind or nature whatsoever (if any) which the said Frederick Charles Norman might consider himself to have against the society, and that he shall enter into the release and covenants hereinafter contained, and that in consideration of the premises the company shall pay to the said Frederick Charles Norman the sum of £2000."

The agreement then contains clauses.

(1) That Norman will resign his positions in the company, and in the Friendly Society, and use his best endeavours to procure a Mr. Stewart to be appointed a director, and a Mr. Cole, chairman of the directors of the company.

(2) That he will hand over to the company all its property.

(3) That he will forthwith assign, or cause to be assigned, the said shares and all shares to which he is legally or equitably entitled in the company to such person or persons as the company shall direct.

(4) The company agrees to forthwith stay the recited proceedings without costs.

The agreement then proceeds to state that the company has paid Norman £2000; and contains a comprehensive release by Norman of all claims against the company, and covenants by him that he will not embarrass the company, or carry on assurance business of any kind theretofore carried on by the company; and that he will not in Ireland for five years, or in England or Scotland for one year, be engaged in the promotion of any company for carrying on any assurance business then carried on by the company, or be engaged or interested in such business.

Now, I desire to make perfectly clear my opinion as to the validity of this agreement. It was *ultra vires* of the company to pay money under an agreement, part of the terms of which was that Norman should release his claims against the Friendly Society

in favour of Mr. Norman, and to simplify the matter for consideration, I do not enter on that question. It was not considered by Barton, J. The actual money loss, if any, which accrued to the company by reason of it has not been ascertained. I shall treat the case as if such a clause was not contained in the agreement. Neither do I doubt the power of the company to make a *bona fide* compromise of the pending actions, and of the claims against it of Mr. Norman ; nor, as Barton, J., has negatived fraud, do I venture to impute any fraud to those who entered into this agreement. But an agreement with a limited company, though *bona fide*, may be *ultra vires*. The distinction between the effect of *ultra vires bona fide agreements* and fraudulent *ultra vires agreements* is well known, and was elaborately discussed by Lord Selborne in delivering the judgment of the Privy Council in *Hirsche* v. *Sims* (1). All *ultra vires* agreements are void ; the distinction between the two classes is in reference to the mode of calculating the amount of the liability thereunder to the company of the parties to them.

The ground of my judgment is that part of this agreement is for the purchase by the company from Norman, and the sale by Norman to the company, of 686 of the company's own shares. I need hardly say that, although one of the terms of this agreement is that Norman shall assign the shares *without payment*, this term in the agreement must be taken to be part of the consideration for which the £2000 was paid by the company ; and that the real transaction, notwithstanding the conveyancing effort to conceal its true nature, included a sale to the company of the shares, not a gift of them. "In consideration of £2000 I (Norman) shall release you (the company) from all my claims against you, and in addition I shall give you 686 of your own shares for nothing," involves and contains as an inseparable part an agreement for the purchase by the company of its own shares. Part of the consideration, and that an undefined part, was for the purchase of those shares—was, in fact, *the price* of those shares. Therefore the agreement in its entirety was void.

Lord Macnaghten (whose recent death all interested in the due

(1) [1894] A. C. 654.

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application of legal principles deplore), in distinguishing between surrender of its shares to a limited company, which, under certain circumstances, is valid, and the purchase of those shares by the company, says, in the case—now a leading one—of *Trevor* v. *Whitworth* (1):—"Surrender of shares stands on a different footing. It is not mentioned in the Companies Acts, but I conceive that there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction."

The present case is more palpable than was *Trevor* v. *Whitworth*. "In consideration of a sum of money I agree to give you 686 shares for nothing," in my opinion means, and is nothing more than, "in consideration of a sum of money I agree to give you 686 shares"; and that is a sale, and a sale for value. Moreover, the state of circumstances shows that the change of property in the shares was a vital part of the transaction. The shares carried with them voting power. The matter in difference was who should be directors of the company—Norman and his party, or those directors who were plaintiffs in the action. This depended on voting power, and may have depended on the voting power incident to those particular shares.

It has been rightly argued for the appellants that we cannot divide or distribute the consideration, and allot one portion of it to the agreement to purchase shares, and another to the release. Each part of the consideration pervades every part of the agreement; and the agreement, *in its entirety*, is *ultra vires* and void; and were it not for one matter, Norman should have been charged with the entire of the £2000 as and for loss which the company sustained by reason of this illegal and unauthorized payment of £2000 to him.

The matter I refer to is that when a Court of Equity is applied to to declare an agreement void as *ultra vires* the company, if the applicant has received anything under that void agreement, the Court will compel him to do equity, and, as far as possible, to bring back

(1) 12 A. C. 438.

all that he has received under that agreement, either in specie or by making compensation to the extent of its value. This is not, as has been suggested, by making a new agreement. Such a thing cannot be done by any Court. It is a condition for granting relief.

Consequently, it appears to me—(1) that, *prima facie*, Norman is chargeable with the entire £2000 received by him under the *ultra vires* agreement; (2) that the value of those parts of the consideration which were legal and *intra vires* the company, *i. e.* the release of Norman's claims against the company, and the value of his covenants with the company—excluding the release of his claims against the Friendly Society—should be valued, and the amount of that value should be paid by the company to Norman as a condition of relief; or, what is the same in practical effect, set off against so much of the £2000; and that the money loss to the company should be ascertained, not at the full sum of £2000, but at the excess of the £2000 above the value of the legal portion of the consideration moving from Norman. Were there any real difficulty in ascertaining this sum exactly, the onus of determining it would rest on Norman, the trustee guilty of misfeasance, with the usual result to him if he failed to discharge that onus—that the Court should fix it as best it could. But in the present case there is not much difficulty.

We must take the £2000 as the value of the shares and of the other considerations moving from Norman. Now, if we can ascertain the value of the shares, the value of other considerations moving from Norman is the £2000, *minus* that ascertained value of the shares. Mr. Wilson's argument, in opening the appeal, was that there was no evidence of the value of the shares. In this he overlooked two important statements—one in the affidavit of Norman, the other in the affidavit of Cooper.

Norman swears, in paragraph 27 of his affidavit—a paragraph which deals with the value of the consideration at the time of the agreement of January, 1905:—"These shares were marketable at more than their full value." Surely, upon this statement, I can, and as against Mr. Norman ought to, fix their value at par. It is more advantageous to him than fixing it at something more than par. So, too, Cooper swears, in the 12th paragraph of his

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affidavit: "In 1905, after having left the board, I bought 100 additional shares, for which I paid £100." As against this there is no evidence that a share was ever sold at less than par.

For myself, I have no hesitation in fixing the value of the shares at par—£686; and assuming, in favour of Norman, that the value of his release of the Friendly Society was no more than a nominal sum, I hold that the value of the legal portion of the consideration could not exceed £2000, minus £686; *i.e.*, £1314. Included in this would be the arrears of salary, in respect of which something over £1000 was claimed, though unsatisfactorily vouched; and the balance would represent something for terminating his tenure as Managing Director and his covenants in restraint of future action.

As to excusing the directors under section 279 of the Act of 1908, so far as regards the £686 and interest, the disguised form of the agreements showed, as I have already observed, knowledge that the purchase of its own shares was illegal; but, even had they not known it, I should have held that it was not reasonable that the director of a company should be ignorant of a proposition in insurance law so elementary since 1887 (the date of the decision of the House of Lords in *Trevor* v. *Whitworth* (1)).

In my opinion the decision of Barton, J., as to the £686 and interest should be affirmed.

Holmes, L.J., said that he had read the judgment which Cherry, L.J., was about to deliver, and concurred in it.

Cherry, L.J.:—

This is an appeal from that portion of the order of Barton, J., made in this matter on the 14th November, 1912, whereby he declared that two of the former directors of the company, F. E. Norman and Edwin Cooper, were liable to contribute to the assets of the company the respective sums of £242 and £686 by Norman, and £220 by Cooper, as set out in the order.

The 215th section of the Companies Act, 1908, under which this order has been made, is very general in its terms and very wide in its scope. It gives power to the Court to assess damages against, amongst others, any past or present director, who has

(1) 12 A. C. 409.

been guilty of any misfeasance or breach of trust in relation to the company. Its terms are almost identical, so far, at all events, as they affect the present application, with those of section 165 of the Companies Act, 1862, of which it is the successor.

The latter section has in two leading cases of great authority received an interpretation in the Court of Appeal in England, and in the House of Lords, which, however, greatly limits its scope, and, in my opinion, we are bound to apply the same limitations in interpreting the 215th section of the Act of 1908 as the Courts did in the cases to which I am about to refer in interpreting the 165th section of the Act of 1862.

The first of these cases in point of time was *Coventry and Dixon's Case* (1). There it was sought to hold two directors of the company guilty of misfeasance for having acted as directors without being holders of the number of shares necessary to qualify them according to the articles of association. They were so held liable by Jessel, M.R., and ordered to pay into Court a sum equal to the nominal amount of the shares requisite to qualify them to be directors. This decision was, however, unanimously reversed by the Court of Appeal, and in giving judgment both James, L.J., and Bramwell, L.J., lay down general principles as to the construction of the section which, to my mind, clearly apply to the present case.

"I am of opinion," says James, L.J. (2), "that that section does not create any new liability or any new right, but only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary procedure of the Courts. In order to enable the Court to apply that section, the liquidator, as it seems to me, must show something which would have been the ground of an action by the company if it had not been wound up. I am of opinion also that the word 'misfeasance' in that section means misfeasance in the nature of a breach of trust, that is to say, it refers to something which the officer of such company has done wrongly by misapplying or retaining in his own hands any moneys of the company, or by which the company's property has been wasted, or the company's credit improperly pledged. It must be some act resulting in some actual loss to the company."

(1) 14 Ch. D. 660. (2) *Ibid.* at p. 670.

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To the same effect is the judgment of Bramwell, L.J. (1). "It seems to me," says he, "that the sole object of the clause is to give a summary remedy for that for which there would be a remedy without that section in the Courts of law," and again, a little further down, he says:—"This is not a section for punishing a man who has been guilty of misfeasance, but for compensating the company in respect of the loss occasioned by the misfeasance."

Two principles are thus clearly laid down by the Court of Appeal in *Coventry and Dixon's Case* (2) which very much limit the scope of the section—(1) That it applies only to cases where a cause of action would, independently of the section, exist, at the suit of the company, in the Courts of Law or Equity; and (2) That "misfeasance" as referred to in the section, is limited to misfeasance which results in actual pecuniary loss to the company.

On both these points the principles laid down in *Coventry and Dixon's Case* (2) have been expressly adopted by the House of Lords in the more recent case of *Cavendish-Bentinck* v. *Fenn* (3). The facts of that case bear no resemblance to those in the case now before us, but the principles I have mentioned are clearly set forth in the judgments of the noble Lords. On the first point, namely, the necessity for the existence of some cause of action, Lord Macnaghten (4) says:—

"The 165th section of the Act of 1862 has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which, apart from that section, might have been vindicated either at law or in equity."

On the second point he is equally explicit—"It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company."

Lord Herschell's (5) judgment is to the same effect on this point. "I think," he says, "that in order to establish a claim to

(1) 14 Ch. D., p. 673.
(2) *Ibid.* at p. 660.
(3) 12 A. C., p. 652.
(4) 12 A. C., p. 669.
(5) *Ibid.* at pp. 661–2.

relief it would be necessary not only to show a breach of duty but to show a breach of duty which resulted in pecuniary loss to the company. It may be perfectly true that where there is a duty, whether arising out of a contract or otherwise, by one person to another an action will lie in respect of a breach of that duty although no substantial damage has been suffered. In an action nominal damages may be recovered wherever a breach of duty is shown. But I certainly do not think that any such doctrine can be applied to the 165th section."

Now, if we apply these principles to the present case, it appears to me that there will be great difficulty in supporting the portions of the order made by Barton, J., with which the present appeal is concerned.

Take, first, the case of Norman as regards the endowment policies, in respect of which he has been declared liable to refund £242 to the company. It appears that in 1898 he and his wife (acting in this matter as trustee or agent for him) each contributed, in cash, a sum of £100 to acquire endowment policies in the Irish Provident Friendly Society, and that they thereby became entitled without making any further payment to obtain from the Friendly Society, after the expiration of eight years, if they were then alive, each the sum of £150. Everything was, so far as I am aware, perfectly regular and legal as regards these policies, so long as they were controlled by the Friendly Society; and if no change had been made in the business, Norman and his wife would have been paid in due course the sum of £300 in 1906.

In December, 1906, however, the Irish Provident Assurance Company was formed, and it at once took over all the business of the Friendly Society as regards endowment policies, acquiring all the assets, and rendering itself subject to the liabilities, so far as it could legally do so. This Friendly Society business, as I understand, constituted at first almost the entire business of the new Assurance Company. It appears to have been a very profitable business, for I find by the official liquidator's affidavit that for the first two years during which the Assurance Company carried on the business the sum of £19,454 13*s.* was received in premiums, while the claims paid amounted to only £3,456 8*s.* 7*d.*, leaving such a large credit balance that the company was able,

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after payment of all commissions, salaries, and management expenses, to apply £10,644 12*s.* 10½*d.* to what are called "Establishment Expenses." This profitable business must have been mainly the business of the Friendly Society, and it clearly shows, I think, that if the Friendly Society had continued its business instead of transferring it to the Assurance Company, it would have been perfectly solvent, and would, in due course, in the year 1906, have been able to pay to Norman and his wife the two sums of £150 each due to them on their policies.

In the year, 1901, however, an arrangement was come to with the new company that Norman and his wife should surrender their policies for what was then calculated to be the surrender value of same, viz., £121 each, and that they should accept payment, not in cash, but in fully paid up shares of £1 each in the new company, taken at their par value. They signed receipts for £121 each, but no cash payment was made to them. The 242 shares were duly allotted to them, but no dividend has been paid on these shares (except one which has been ordered to be refunded in this matter).

The effect of the decision of this Court in *Flood's Case* (1) was to render this surrender of the policies by the Normans to the new Assurance Company illegal, it having been *ultra vires* for the company to enter into what was there held to be life assurance business. Now, apart from the 215th section of the Companies Act, 1908, what are the rights of the parties under these circumstances? What cause of action has the company against the Normans? Its right is, as far as I can see, only to cancel the contracts and restore the parties to the position in which they would have been if the surrenders had never been made? But how can this now be done? Barton, J., has, as I understand his judgment, held that the surrender of the policies involved a double transaction, viz., first a payment in cash of £121 on each, and then a re-investment of these sums in fully paid up shares in the company; and he has ordered the Normans to repay the sum of £242, which in this view of the facts they received for an illegal consideration. But surely,

(1) 46 I. L. T. R. 214.

if Norman and his wife repay to the company what they received, or are assumed to have received, they are entitled to get back from the company what they gave to it in consideration of the payment, namely, the old policies created by the Friendly Society. How could the company be listened to in a Court of Equity if it sought to recover all payments made on liabilities to members of the Friendly Society, and at the same time to keep all the assets it received when the business was taken over, and all contributions subsequently paid in by members of the old Friendly Society? Surely that would be contrary to natural justice. It is said that the business of the Friendly Society was an insolvent one, but figures given in the affidavit of the official liquidator do not bear out this contention. Had the business been continued by the society, I have no doubt that it would in due course have discharged its liabilities to the Normans in 1906; and I am clearly of opinion that the company cannot recover any sums of money paid to members of the Friendly Society on foot of policies, unless they are in a position to segregate the assets of the Friendly Society which they have received, and allow to the holders of the policies such rights as against these assets as the policy-holders were entitled to before the business was taken over.

Apart from these considerations altogether, what pecuniary loss has the company sustained by the surrender of these policies? If we look at the substance of the transaction, as I think we are bound to do, not at its form, they have never paid a farthing in cash to the Normans on foot of these policies, or (except as regards the one dividend paid, which has been ordered to be returned) on foot of the shares granted in lieu of them. Surely the company is in a better position financially to-day than it would have been in if it had never taken surrenders of these policies. In the latter event it would undoubtedly have paid the full amount due upon them, viz., £300 in 1906. On both grounds, therefore, I am of opinion that the order of Barton, J., so far as it directs the surrender value of these policies to be restored by Norman, is wrong, and should be reversed.

Cooper's position is, I understand, exactly the same as that of Norman, and the order as against him for £220 is, in my opinion, equally bad.

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The remaining portion of the order appealed from is that which declares F. C. Norman liable to contribute to the assets of the company the sum of £686, being the par value of 686 shares in the company which he transferred to the company in pursuance of the covenant contained in the deed of the 20th January, 1905. This sum is described in the order as "compensation for his misfeasance and breach of trust." I quite agree with Barton, J., that it was *ultra vires* for the company to buy its own shares in this way, and, further, that it was a breach of trust for Norman, while a director, to agree to such a purchase. If, therefore, an order had been made setting aside this deed *in toto*, on the ground of the illegality of the consideration, I could understand it. But this is not what the learned Judge has done. On the contrary, as I understand his judgment, he treats all the other provisions in the deed as binding, except the transfer of the shares to the company. And he directs that Norman is to pay in lieu of the shares, which are to be returned to him, the par value of the shares. He amends the deed by substituting for an illegal consideration what would, of course, have been perfectly legal, namely, a cash payment. But what authority is there for such an order? I again apply the test as laid down by the House of Lords in *Cavendish-Bentinck* v. *Fenn* (1). What remedy, apart from section 215 of the Companies Act, 1908, would there have been in this state of affairs? If an action had been brought by the company against Norman, it may be that the whole transaction would have been set aside on the ground of the illegality of the traffic in the shares of the company, and Norman might have been ordered to repay the £2000 he received as consideration money for the deed; but if such an order had been made, Norman would also have been restored to his original rights apart from the deed. His claim for arrears of salary would have revived, and his claims for damages for wrongful dismissal, and on foot of his covenants not to compete with the company in insurance business for the periods mentioned in the deed, would have been also dealt with. Barton, J., has treated these portions of the deed as still binding, while he alters

(1) 12 A. C. 652.

one of the other provisions of the deed, to the manifest disadvantage, in the events which have happened, of one of the parties. For, whatever value the shares may have possessed at the time the deed was executed, they are manifestly now perfectly worthless. I do not think that such an order could have been made in any action either at law or in equity, and I therefore think it cannot be made under the 215th section of the Companies Act.

Again, the jurisdiction of the Court under the section is only to award compensation for loss actually sustained by the company. What evidence is there of any such loss in this matter, whether we take the deed as a whole or deal with the transfer of the shares as a separate transaction? As regards the deed as a whole, considering the position which Norman occupied under the prior deed, appointing him Managing Director (which latter deed has not been alleged to be invalid), and all the circumstances of the case, I think it was a most advantageous one for the company, putting an end to litigation, and relieving the company from what might have been very serious liabilities. The directors, other than Norman, obviously thought it an advantageous deed, or they would not have sanctioned it; and there has been no evidence on the present application to show that they were wrong in this view. Again, if we take the transaction as to the shares by itself, what loss has been occasioned to the company by it? It is impossible to assume, as Barton, J., has apparently done, that Norman would have been willing to pay £686 in cash to the company in lieu of transferring the shares, or rather to deduct the £686 from the £2000 paid to him under the deed. If the illegality of this transaction had been noticed at the time, some different arrangement would have probably been made; but whether that would have been more or less beneficial to the company than the deed actually executed it is quite impossible now to say.

I am of opinion, therefore, that this portion of the order cannot be sustained any more than that which deals with the surrender of the endowment policies, both upon the ground that the compromise entered into by the deed of 1905 must be treated as a whole;—that it must either remain binding on all the parties,

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or be set aside *in toto*, and upon the ground that there is no evidence that any loss was occasioned to the company by it.

In my judgment, therefore, all the parts of the order which have been appealed from should be reversed with costs.

Solicitors for the liquidator: *G. D. Fottrell & Sons.*

Solicitor for Messrs. Norman and Cooper: *Michael J. O'Farrell.*

W. G.

ESTATE OF RICHARD OLPHERTS; ESTATE OF ELIZABETH HENRIETTA OLPHERTS; OLPHERTS *v.* CORYTON (No. 2).

Barton, J.
1913.
April 21, 22, 23, 24.
May 7.

Administration—Executor—Retainer—Payment into Court—Assets—Constructive possession by legal personal representative—Two estates being administered in one action—Transference of fund from one estate to the other.

The estates of A and B were administered in one action. The estate of B (who was A's executor) was entitled to the residue of the estate of A when ascertained. B's executor, who was a creditor of B, brought the action as executor and creditor on behalf of himself and all other creditors; and asserted his right of retainer in the statement of claim, and throughout the proceedings. A's estate was realized, and the money representing the proceeds was brought into Court. The executor of B died pending the suit, which was continued by substituting his executors as plaintiffs. After A's estate had been realized, an order was made upon the application of the plaintiffs, directing an inquiry to ascertain what part of the funds in Court represented the residue of A's estate, and ordering the same to be transferred to the credit of B's estate, and it was declared that the plaintiffs were entitled to exercise their right of retainer, as the executors of B's executor, in respect of the amount so ascertained, in discharge of the debt due them from B's estate.

MOTION ON NOTICE.

The material question now arising was as to retainer claimed by the executors of Francis Montgomery Olpherts, deceased, over certain funds in Court which represented the estate of Richard Olpherts deceased, Francis Montgomery Olpherts being the executor of Richard Olpherts, and also a creditor on his estate for, *inter alia*, two sums of £1000 and £3000 which he had paid as surety for Richard Olpherts. (See previous report of *Olpherts* v. *Coryton* (1) as to executor's retainer and the operation of Hinde Palmer's Act, 1869 (32 & 33 Vict. c. 46).)

(1) *Ante*, p. 211.

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By her will, dated 11th December, 1891, Elizabeth Henrietta Olpherts appointed her husband Richard Olpherts her executor and universal legatee and devisee. She died on 20th January, 1892.

By his will dated 9th June, 1887, Richard Olpherts appointed Francis Montgomery Olpherts (who was his brother and a creditor on his estate) his executor. Richard Olpherts died on 13th July, 1892. On 26th September, 1892, Francis Montgomery Olpherts, as executor of Richard Olpherts, and a creditor on behalf of himself and all other creditors, issued a writ for the administration of the estate of Richard Olpherts, and if necessary for the administration of the estate of Elizabeth Henrietta Olpherts. On 7th December, 1893, he filed a statement of claim, praying for the administration of both estates. The statement of claim, after stating sundry reasons for administration by the Court, set out certain debts owing to the plaintiff by Richard Olpherts, including (amongst others) two sums of £1000 and £3000, which he had paid as surety for Richard Olpherts. Paragraph 15 stated that he claimed as the executor of Richard Olpherts to be entitled to a right of retainer in respect of the debts due to him by his testator's estate.

The plaintiff, Francis Montgomery Olpherts, died in 1897, and by order dated November 1st, 1897, the proceedings in the action were ordered to be continued in the names of Lionel Charles Frederick Wynne, and the Rev. Henry Haworth Coryton, his executors, and also in the names of Rev. Francis E. Coryton and Richard R. G. Crookshank, who were trustees of the will of Richard Olpherts, as plaintiffs.

On February 14th, 1894, a primary decree was made for administration of both estates. On January 18th, 1901, the Chief Clerk filed his certificate, and in schedule 6 set out the outstanding personal estate of Richard Olpherts.

Item 5 was a mortgage dated 15th August, 1864, from Richard John Verschoyle, to testator to secure £3000 and interest thereon at 4½ per cent. per annum charged on lands in county Sligo, the property of the mortgagor. The estate of Richard J. Verschoyle was administered in a suit in the Court of the Master of the Rolls, entitled *In re Richard J. Verschoyle*; *Brown* v. *Crofton*, and proved insolvent. The plaintiffs in the present action of

Olpherts v. *Coryton* claimed payment of this mortgage debt in that suit, and obtained payment of £227 18*s.* 9*d.*, being a dividend upon the said debt, which was transferred to the credit of the present suit.

Item 6 was the residue of the estate of Elizabeth Henrietta Olpherts, bequeathed to testator, Richard Olpherts, by her will.

By order of December 13th, 1912, an inquiry was directed as to how much of the funds in Court represented the estate of Elizabeth Henrietta Olpherts, and an inquiry generally as to the sources from which such funds came.

The Chief Clerk filed his certificate on 14th March, 1913.

Item 1 of the schedule thereto set out a sum of £100, which had been paid into Court pursuant to order in this action of April 17th, 1895, by Francis Montgomery Olpherts, on May 14th, 1895.

Item 2 was a sum of £322 15*s.* 11*d.* cash, representing a mortgage for £300 on lands in the county Carlow, realized in the Land Judge's Court, and paid on allocation of proceeds of the sale of lands in *Westenra's Estate* on May 31st and August 7th, 1895.

Item 3 was a sum of £456 18*s.* 6*d.* new consols paid in by the Accountant-General on the administration of the estate of William Ruxton deceased, in the suit of *Ruxton* v. *Ruxton*, under orders of 3rd May, 1897, and 21st February, 1898.

Item 7 set out a sum of £3428 1*s.* 4*d.*, representing a mortgage for £3395 16*s.* 2*d.* charged on lands of Richard Olpherts in the county Londonderry, paid in on December 21st, 1905, by the Accountant-General on allocation of the proceeds of sale of the estate of Richard Olpherts, which was sold by the Land Judge.

All the above items were included in the estate of Elizabeth Henrietta Olpherts.

In addition to the funds in the schedule to the Chief Clerk's certificate, there was a sum of about £6000 representing real estate in which Richard Olpherts was at his decease entitled to the reversion, subject to the life estate therein of Francis Montgomery Olpherts, and this real estate had been sold in the

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Land Judge's Court, after the reversionary interest of the testator Richard Olpherts had fallen into possession. No retainer was claimed in respect of the proceeds of this sale.

John Leech, K.C. (with him, *Barry Meade*), for the plaintiffs, executors and trustees of the will of Richard Olpherts:—

The plaintiffs, having carriage, require the direction of the Court as to whether the plaintiffs, Lionel Charles Frederick Wynne, and Rev. Henry Haworth Coryton, as executors of the will of the original plaintiff, Francis Montgomery Olpherts, are entitled to exercise the executor's right of retainer as regards funds which have come into Court as assets of the deceased Elizabeth Henrietta Olpherts, in respect of certain debts due by the deceased Richard Olpherts to their immediate testator, Francis Montgomery Olpherts, who was the executor of Richard Olpherts. This right of retainer has been expressly asserted by Francis Montgomery Olpherts in his lifetime.

Garrett Walker, K.C. (with him, *John Peart*), for the plaintiffs, the executors of Francis M. Olpherts, as claimants against the estate of Richard Olpherts, in support of the right of retainer:—

This case must be treated as if there had in fact been two separate suits for the administration of the estates of Elizabeth Henrietta Olpherts and of Richard Olpherts, respectively. It has long since been expressly decided that an executor's right of retainer is not lost by the payment of funds into Court, in an action for administration: *Richmond* v. *White* (1), *In re Compton* (2). In the case of *Taaffe* v. *Taaffe* (3), Chatterton, V.-C., held that while an executor could not exercise his right of retainer against moneys paid to a receiver in an administration action, the right might be exercised against a sum which was originally lodged in Court under the Trustee Relief Act (11 & 12 Vict. c. 68), and afterwards transferred to the credit of the administration action with the privity of the executor.

(1) 12 Ch. Div. 361.
(2) 30 Ch. Div. 15.
(3) [1902] 1 I. R. 148.

Pulman v. *Meadows* (1) was treated by Cozens-Hardy, J., as an exceptional and peculiar case. The decision is inconsistent with *Taaffe* v. *Taaffe* (2).

Serjeant Matheson, *K.C.*, and *H. C. Bowen*, for Denis William Brown (a specialty creditor of Richard Olpherts in the sum of £7500), resisting the retainer :—

In *Pulman* v. *Meadows* (1) Cozens-Hardy, L.J., held that an executor was not entitled to retain a fund transferred to the credit of a suit for the administration of the estate of his testator from an old suit in which such testator had been found entitled to the fund.

[BARTON, J., referred to Halsbury, Laws of England, vol. xiv, p. 257 :—"The right (of retainer) extends to money which has been paid into Court while he (the executor) was representative, and which but for such payment would have come into his hands."]

The statement in Halsbury is taken from the judgment of Cotton, L.J., in *In re Compton* ; *Norton* v. *Compton* (3), and must be read as applicable to the facts of that case. If it were to be interpreted as laying down as a general rule that any funds paid into Court in an administration action might be retained by the executor, it would be inconsistent with the decisions as to receivers, *e.g.*, *In re Jones* ; *Calver* v. *Laxton* (4), and the decision of the Vice-Chancellor on the first point raised in *Taaffe's Case* (2). Where money is paid into Court under the Trustee Relief Act (as in the second branch of *Taaffe's Case* (2)), the Court is under no obligation to find the true owner of the money for purposes of distribution, but will be satisfied with the legal title of an executor. But it is quite otherwise in an action for administration where the Chancery Division is bound to distribute the assets according to all the equities which may be found to affect them before the termination of the suit. In such a case funds will never, in fact, be paid out to an executor where the Court has got

(1) [1901] 1 Ch. 233.
(2) [1902] 1 I. R. 148.
(3) 30 Ch. Div. 15.
(4) 31 Ch. Div. 440.

Barton, J. 1913. OLPHERTS v. CORYTON (No. 2).

decisive notice that another action is pending for the administration of his testator's estate. And this case has been argued throughout on the basis that the estates of Elizabeth Olpherts and of Richard Olpherts are to be regarded as having been administered in separate suits. Our objection to this retainer is not merely of a "dilatory" character, but will apply even when a clear balance shall have been ascertained as coming to the estate of Richard Olpherts under the residuary gift in his wife's will.

Peart, in reply :—

Pulman v. *Meadows* (1) is clearly distinguishable. In that case—(1) The suit was fifty years old, and the Court in such case never makes payment out without inquiry. (2) The transfer was made at the instance of the personal representative, and he had not at any time claimed retainer or asked for payment to himself. (3) The Judge who decided the case had himself made an order as to costs inconsistent with retainer. (4) There was no complete chain of representation, as there is here.

As to the cases relied on in which receivers have been appointed and have got in the estates in question, they were decided on grounds of waiver or estoppel which do not apply here.

May 7. BARTON, J. :—

[After referring to the facts, and to the former proceedings in the suit, his Lordship proceeded :—]

The personal estate of the testator, Richard Olpherts, comprised two items—(1) The residue of Elizabeth Henrietta Olpherts' estate, bequeathed by her to Richard Olpherts; and (2) a mortgage debt due to Richard Olpherts by the late Richard J. Verschoyle. The plaintiffs, Mr. Wynne and Mr. Coryton, are the executors of Francis Montgomery Olpherts, who was the executor and also a creditor of Richard Olpherts. The question for decision is, whether they can exercise a right of retainer over

(1) [1901] 1 Ch. 233.

the above items of personal property, in discharge of the debt, which is found to have been due by the testator to his executor, Francis Montgomery Olpherts.

In the first place, I shall deal with item (1), viz., the residue of Elizabeth Henrietta Olpherts' estate. Her estate, which is also being administered in this suit, consisted, speaking broadly, of a sum of £100 due to her, which has been paid into Court, and of three mortgage debts charged respectively upon the Westenra, Ruxton, and Olpherts estates. The mortgage debts have been realized by means of three suits in one branch or another of the Chancery Division, and the proceeds have been paid into Court. Owing to the necessity of realizing the mortgage debts by Chancery proceedings, this action has been a long and troublesome one; but we are now at last in a position to close the administration of her estate. An order will now be made referring it to the chief clerk to ascertain what part of the moneys in Court represent the residue of her estate, and directing the amount so ascertained to be transferred to the credit of the estate of Richard Olpherts, to whom she bequeathed it. It is agreed that a further question should be decided upon the present motion, viz., whether the residue, upon being transferred to the credit of Richard Olpherts' estate, will pass constructively into the hands of the plaintiffs, who represent his executor, so as to enable them to exercise a right of retainer. That question must, in my opinion, be answered in the affirmative.

The decree for the administration of Richard Olpherts' estate did not affect the executor's right of retainer. On the contrary, the executor's legal right was preserved, when the decree ordered the estate to be administered in due course of administration: *Ex parte Campbell* (1). The executor has not lost, forfeited, or abandoned his right. On the contrary, he has asserted it at every stage, from the date of the delivery of the statement of claim down to the date of the bringing of this motion. When a conflict of duty and interest seemed likely to cause embarrassment in the conduct of the suit, he took the exceptional course of having himself represented by a separate solicitor and counsel, in his

(1) 16 Ch. D. 198, 200, 201.

Barton, J. 1913.

OLPHERTS v. CORYTON (No. 2).

capacity of creditor. I do not remember any case of an executor's retainer in which the executor has from first to last taken up a more clear, consistent, and straightforward position. He has not been inactive; and he is not too late. An executor need not assert his rights until the occasion arises: *In re Rhoades* (1); and the occasion arises, so far as this suit is concerned, upon the present motion.

When assets are paid into Court in the presence and with the privity of the executor, which, but for such payment, would have come into his hands, the right attaches to such money: *Richmond* v. *White* (2). The Court never allows an order for payment into Court to prejudice the right of the party paying in. An order for payment into Court, when made in the presence and with the privity of the executor, is equivalent to a duplex order (*a*) paying the executor, and (*b*) giving him liberty to lodge the money in Court. These principles were applied in *Taaffe* v. *Taaffe* (3) to a sum lodged in Court under the Trustee Relief Act, to which a testator was entitled in remainder. It fell into possession after the testator's death, and was, in the presence of his executors, transferred to the credit of a suit for the administration of his estate. I treat the present case as if there were two suits for the administration of the two estates, and an order of transfer of funds from one suit to the other. The *ratio decidendi* of *Taaffe* v. *Taaffe* (3) applies, in my opinion, to the present case.

Pulman v. *Meadows* (4) was a peculiar case. An express order had been made which was inconsistent with the right of retainer. It was also the case of a suit which was so old and peculiar that the Court, if there had been no second suit, would not have paid the moneys out to the executor, but would have ascertained by an inquiry the persons entitled, and would have distributed the funds without the executor's intervention. That case has no resemblance to the present case, which is a plain case, in which an executor has brought a suit, both as executor and as creditor for himself and other creditors, to administer the estate of his testator, and also

(1) [1899] 2 Q. B. 347.
(2) 12 Ch. D. 361.
(3) [1902] 1 I. R. 148.
(4) [1901] 1 Ch. 233.

the estate of the person who had bequeathed the residue of her estate to the testator, and has ultimately, after having persistently asserted his right of retainer, succeeded in getting in that residue, and having it transferred to the credit of his own testator's estate.

The same principles apply to the Verschoyle mortgage debt, a dividend upon which was claimed by the plaintiffs in the suit for the administration of the estate of Richard J. Verschoyle, and, as a result, was transferred to the credit of this suit.

The plaintiffs can, in my opinion, exercise the right of retainer in respect of both these items of the personal estate of Richard Olpherts.

Solicitors for plaintiffs (executors and trustees of the will of Richard Olpherts) having carriage : *Crookshank, Leech, & Davies.*

Solicitors for the plaintiffs (the executors of F. M. Olpherts) : *H. T. Dix & Sons.*

Solicitors for William Denis Browne (a specialty creditor) : *Collis & Ward.*

R. W. L.

Appeal.
1913.
April 24.

In re HICKEY, Deceased; HICKEY *v.* HICKEY (1).

Will—Construction—Beneficial interest or trust.

A testator bequeathed to his wife his entire worldly effects to be managed as best she could for the benefit of their children.

Held, that the wife took no beneficial interest.

Appeal by Edmond Hickey from the order of O'Connor, M.R., dated the 7th December, 1912, refusing his application on summons for the administration of the real and personal estate of his late father, Patrick Edmond Hickey, on the ground of want of interest.

The question turned on the construction of Patrick Edmond Hickey's will, dated the 5th January, 1901, which was as follows:—

"I, Patrick Edmond Hickey, farmer, residing in the townland of Knockmeelmore . . . Co. of Waterford, make this my last will and testament. I bequeath to my wife, Catherine Hickey (maiden name Hannifer), my entire worldly effects, to be managed as best she can for the benefit of our children."

Testator died on the 15th January, 1901, leaving his widow and seven children (including the plaintiff) him surviving. Two of these children died intestate and unmarried. On the 22nd of June, 1910, administration with the will annexed was granted by the King's Bench Division (Probate) of the High Court of Justice in Ireland to Catherine Hickey as universal legatee in trust. Catherine Hickey was named defendant in the summons.

Timothy Sullivan, for the appellant:—

The Master of the Rolls adhered to his own recent decision in *Berryman* v. *Berryman* (2), which he thought was undistinguishable from the present case. But both decisions are at variance with

(1) Before O'Brien, L.C., and Holmes and Cherry, L.JJ.
(2) [1913] 1 I. R. 21.

that of the Court of Appeal in *In re Delahunty*; *O'Connor* v. *Butler* (1), where the view taken by Meredith, M.R., of a will substantially the same as the present, was held erroneous. The case which perhaps is closest in its resemblance to Hickey's will is *Barnes* v. *Grant* (2), where there was a bequest of all testator's property to his wife "under the firm conviction that she would dispose of and manage the same for the benefit of their children." Kindersley, V.-C., held that she was only a trustee for the children, who took the whole beneficially. There, as here, there was no possibility of a construction which would give the wife a share with the children. "Benefit" is a larger word than "maintenance and education." In *Blakeney* v. *Blakeney* (3) the words were "to dispose of amongst her children as she may think proper," and it was held by Shadwell, V.-C., that the mother took no beneficial interest.

Norwood, for the defendant, Catherine Hickey :—

There is here an absolute gift to the widow, with words superadded which merely express what a testator would naturally expect in the case of the mother of a family of children who were not of an age to be able to support themselves: *Lambe* v. *Eames* (4); *Mackett* v. *Mackett* (5); *M'Alinden* v. *M'Alinden* (6); *Greene* v. *Greene* (7). The expression of the reason or motive for the gift cannot cut down its legal character. "Management" means retention of the property, and involves the irresponsible control of it. On the other hand, "dispose of" implies a parting with the property. [THE LORD CHANCELLOR referred to *Pickley* v. *Leahy* (unreported). On reading Mr. De Versan's notes of this case, which was decided on the 13th November, 1900, by the Court of Appeal (Lord Ashbourne, L.C., and FitzGibbon, Walker, and Holmes, L.JJ.), it appeared that the question arose upon a will in the following terms: "I leave and bequeath to my wife, Kate Pickley, the absolute management of said farm with profits

(1) [1907] 1 I. R. 507, 510.
(2) 26 L. J. Ch. (N. S.) 92.
(3) 6 Sim. 52.
(4) L. R. 6 Ch. App. 597.
(5) L. R. 14 Eq. 49.
(6) L. R. 11 Eq. 219.
(7) L. R. 3 Eq. 90, 629.

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thereof, she paying all rents and taxes for the same." The Court held, affirming the decision of Porter, M.R., that Kate Pickley took, on the death of the testator, an immediate absolute beneficial interest in the farm, liable to be divested in certain events which did not occur.]

Sullivan, in reply :—

The cases cited by Mr. Norwood were referred to in *O'Connor* v. *Butler* (1), and were distinguished by Sir S. Walker, L.C., at pp. 511, 512.

O'BRIEN, L.C. :—

In construing a will it is desirable before invoking the aid of reported cases to see whether the document to a person of ordinary intelligence may not be reasonably clear.

It is quite possible that a testator may intend to leave either his wife or his children unprovided for. The law gives him power to do so, and we cannot unmake his will because we think he ought to have done differently. Approaching the will of this testator from this point of view the words are, "I bequeath to my wife, Catherine Hickey, my entire worldly effects, to be managed as best she can for the benefit of our children." Can it be reasonably suggested that in this short sentence the testator has expressed an intention that the persons for whose benefit the property was to be managed were the persons whom the Court was to exclude from all benefit under the will? He does not use words which would include the wife among the objects of that beneficial management. Therefore, looking at the will untrammelled by authority, it is to me perfectly clear that the wife took the property for the benefit of the children, and for the benefit of the children only. That may be harsh as regards the wife. It is admitted that it would be as harsh to cut out the children and give all to the wife. In such a case the Court must give effect to the clear words of the will, whatever may be the result.

(1) [1907] 2 I. R. 507, 510

The case of *Mackett* v. *Mackett* (1) is strongly relied on by the respondent, but in that case, as was pointed out by the Lord Chancellor in *O'Connor* v. *Butler* (2)—"Vice-Chancellor Bacon founded his judgment on the primary gift which was made without qualification for her (the wife's) sole and separate use; there was no restriction laid on the legatee; it was not merely a simple gift, but an absolute gift in words expressing absolute property; and the Vice-Chancellor reconciled his judgment with the direction as to the application of the proceeds by saying that the direction was only an expression for the motive of the gift." In the present case there is no primary gift to the wife without qualification. *Mackett* v. *Mackett* (1) can afford us no light. In *Greene* v. *Greene* (3), which was much relied on by Mr. Norwood, the words of the bequest were—"To my dearly beloved wife, well knowing her sense of justice and love to her family, and feeling perfect confidence that she will manage same to the best advantage for the benefit of her children." That case does, at first sight, come nearer to supporting Mr. Norwood's contention; but I think that, in that case, the Court considered that there was really nothing more than a hope or an expression of confidence that the wife would give a benefit to the children. In the present case, the management for the benefit of the children is obligatory. I do not think it is necessary at present to say anything about *Berryman* v. *Berryman* (4). Whether our present decision is inconsistent with it or not can be dealt with when the question arises. It is sufficient to say that in the true construction of this will there was no intention to give any beneficial estate or interest in the testator's property to testator's wife.

HOLMES, L.J.:—

The will is a very short one, and is capable of but two constructions. All the worldly effects of the testator are given either absolutely to his children or absolutely to his widow. The question is which of these two constructions do the words bear. The

(1) L. R. 14 Eq. 49.
(2) [1907] 1 I. R., pp. 511, 512.
(3) I. R. 3 Eq. 90.
(4) [1913] 1 I. R. 21.

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will is as follows:—"I bequeath to my wife, Catherine Hickey (maiden name Hannifer), my entire worldly effects, to be managed as best she can for the benefit of our children." It seems to me that if the words "to be managed as best she can" were left out of the will there could be no doubt about the case, because the will would then read—"I bequeath to my wife, Catherine Hickey, my entire worldly effects for the benefit of our children"—in other words, "in trust for our children." Can it be said that the introduction of the words "to be managed as best she can" alters the construction from what it would have been if these words were omitted, to the extent that the persons for whose benefit the property was given would take nothing? I am quite unable to give the words any construction other than that it is an absolute gift to the children.

CHERRY, L.J.:—

I agree. I would be very glad to hold that the testator intended to give an interest to Catherine, his widow, along with the children. But such a construction is obviously impossible. The clearly expressed intention of the will is that the children only were to take as beneficiaries. The widow is only a trustee for them.

Solicitor for the plaintiff: *Anthony Carroll.*
Solicitors for the defendant: *Hodnett & Son.*

W. G.

McMAHON *v.* HASTINGS.

M. R.
1913.
March 26.
June 11.

Real property—Law of Limitations—Real Property Limitation Act, 1874, *s.* 3 *—Adverse possession—Mother entering as bailiff—Purchaser with notice of infant's rights—Demand of possession by infant on attaining age—Notice—Vendor and purchaser.*

A person entering upon an infant's estate with notice of the infant's rights becomes his bailiff.

Quinton v. *Frith* (I. R. 2 Eq. 396) followed.

A person who by so entering into possession of an infant's estate makes himself a bailiff of that estate, continues to be such bailiff, notwithstanding the infant's coming of age, until the relationship is dissolved by some other circumstance or combination of circumstances.

A demand of possession by the infant will be such a circumstance, but if made within six years before action brought, it affords no defence under section 3 of the Real Property Limitation Act, 1874.

The following statement of the facts and pleadings is taken from the judgment of his Lordship:—

"This action was brought to have a deed of conveyance to the defendant declared invalid under the following circumstances:—One Patrick McMahon held certain premises in Kildysart, county Clare, under a lease, dated 27th May, 1874, for a term of fifty-one years, which is still in existence.

"By indenture dated the 31st December, 1883, Patrick McMahon mortgaged these leasehold premises to William Boyd, to secure a debt of £288 18*s.*, with interest thereon at the rate of 5 per cent. per annum.

"Patrick McMahon was married to the defendant, Kate Hastings, and died intestate on the 29th February, 1884, leaving him surviving his widow, the said Kate Hastings, and two infant children, of whom the plaintiff is one. The other child died in infancy, so that the beneficial interest in the premises devolved, subject to the mortgage, and to claims in the administration of the estates of Patrick McMahon and the child

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who died, upon the plaintiff and the defendant, Kate Hastings, in equal shares.

"The premises mentioned were licensed for the sale of intoxicating liquors, and Patrick McMahon carried on therein the business of a publican and grocer. After his death his widow continued to reside on the premises, and to carry on the business. She did not take out administration to her deceased husband.

"The plaintiff resided with her mother for about a year after the father's death, and then went to live with her grandfather at a place about three miles distant from Kildysart. The other child lived with her mother until its death at the age of six years. In November, 1887, the mother married George Hastings, and he went to reside on the premises and carried on the business.

"By deed of assignment, dated 22nd October, 1889, made between William Boyd (the mortgagee) of the one part, and Michael Hastings (who was George Hastings' father) of the other part, reciting the lease and the mortgage already mentioned, and reciting that Catherine Hastings (viz. the defendant, Kate Hastings) had out of her own resources paid off a considerable portion of the mortgage debt, leaving due and owing on foot thereof the sum of £146 1*s*., for principal and interest from the 25th March then last past, and reciting that William Boyd had agreed to assign, as thereinafter appeared, the mortgage and the moneys thereby secured to the said Michael Hastings for the sum of £125, it was witnessed that in consideration of £125 paid to the said William Boyd by the said Michael Hastings, the receipt of which was acknowledged, William Boyd assigned, or purported to assign, to Michael Hastings the mortgage debt of £288 18*s*., with interest to accrue thereon, in trust, however, as to the sum of £125 with interest, for his own use and benefit, and as to the residue for the sole and separate use of the said Catherine Hastings; and it was also witnessed that William Boyd assigned the leasehold premises to Michael Hastings for all the estate of William Boyd therein, under the mortgage. By a further indenture, dated 4th March, 1897, made between George Hastings and the defendant, Kate Hastings, of the first part, Bridget Hastings (who was the mother of George Hastings)

of the second part, and the defendant, Maria Hastings (his sister), of the third part, reciting the lease, the mortgage, and the assignment thereof to Michael Hastings, and further reciting that by will dated the 19th March, 1891, Michael Hastings bequeathed everything he should die possessed of to his wife, the said Bridget Hastings, and reciting that George Hastings had married Kate McMahon, the widow of the said Patrick McMahon, and reciting that there was then due on foot of the said mortgage to the said Bridget Hastings the sum of £120 and interest, and reciting that George Hastings and Kate Hastings had agreed to sell to Maria Hastings the said house and premises for the sum of £150, and had asked the said Bridget Hastings to join in the assignment, and to release the premises from the said mortgage debt of £120, and all interest that might be due on foot thereof, it was witnessed that in pursuance of the said agreement, and in consideration of the sum of £150 in hand paid by the said Maria Hastings to the said George Hastings and Kate Hastings, they the said George Hastings and Kate Hastings, as beneficial owners, assigned to the said Maria Hastings the said leasehold premises, to hold to the said Maria Hastings for the residue of the said term of fifty-one years; and it was also thereby agreed that the said Bridget Hastings should release the said premises from the said mortgage debt then due on foot of same, and the said Bridget Hastings thereby released the said demised premises and every portion thereof from the said mortgage debt

"In the October following the execution of the last-mentioned deed, Maria Hastings got a decree in ejectment against George Hastings and Kate Hastings, and on the 12th September, 1898, executed the decree and got possession of the premises, and has retained possession up to the present. After the ejectment George Hastings and Kate Hastings went to Scotland, where the former got some employment. The plaintiff continued to live with her grandfather until 1902, when she went to reside with her step-father and mother. She also got employment in Scotland, and at the time this action was brought she was engaged as a nurse in Renfrew District Asylum. She attained the age of twenty-one years on the 28th February, 1905, and in the month of July, 1906, she came over to Ireland, went to the county Clare, and then visited

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Maria Hastings, from whom she demanded possession of the lease-hold premises, offering to pay her the money she, Maria Hastings, had paid. Maria Hastings refused. The plaintiff then returned to Scotland, and took no further step until the 1st November, 1911, when she obtained a grant of administration to the estate of her father, Patrick McMahon deceased. She then commenced this action on the 16th November, 1911.

"By the statement of claim, she claimed a declaration—(1) that the deed dated the 4th March, 1897, be declared null and void against her; (2) that the defendant Kate Hastings, on the death intestate of Patrick McMahon, entered into occupation and possession as to two-thirds of the premises as bailiff and trustee for the plaintiff, and continued as such bailiff and trustee until the 4th March, 1897; and (3) that the defendant, Maria Hastings, on the 4th March, 1897, became possessed of the premises as to the said two-thirds, as bailiff and trustee of the plaintiff, and has since continued in possession as such. The plaintiff also claimed a partition and account.

"The defendant Maria Hastings pleaded the Real Property Limitation Act, 1874, as a defence to the action, relying on section 3. The plaintiff's contention was, that the statute offered no defence, as the defendant Maria Hastings was in possession as bailiff of the plaintiff."

P. Lynch, K.C., and *Poole Hickman*, for the plaintiff:—

The mother's position was that of a bailiff for the infant: *Quinton* v. *Frith* (1); *Petty* v. *Boscombe* (2). Section 3 does not apply. The defendant Hastings took with notice, and is in the same position as the trustee from whom she bought.

S. L. Brown, K.C., and *R. Cullman*, for the defendant:—

The Statute of Limitations would always have been an answer in the bailiff cases, were it not for the "bailiff" point. A constructive trustee could always plead the statute. The doctrine of constructive notice is not one to be extended. This lady was never a bailiff or trustee, she merely took a bad title. It has

(1) I. R. 2 Eq. 396, at p. 414. (2) 4 Giff. 390.

never been held that a purchaser taking possession through the sheriff took over the bailiffship of an absent child. If the defendant is not an express trustee or bailiff, the case comes within section 3.

Poole Hickman, in reply :—

Section 3 only applies to a *bonâ fide* purchaser for value: *Morgan* v. *Morgan* (1); *Dormer* v. *Fortescue* (2). This case is on all fours with *Pelly* v. *Bascombe* (3).

Quinton v. *Frith* (4) is strongly in our favour.

O'CONNOR, M.R.— June 11.

[Having stated the facts up to the assignment of the 22nd October, 1889, continued as follows]:—

The first observation to be made upon this assignment is that it is difficult to understand how the mortgagee, to whom confessedly only £146 1*s.* was owing, purported to assign a debt of £288 18*s.*

The next thing calling for observation is the recital that so much of the mortgage-debt as had been paid off was discharged by Catherine Hastings out of her own resources. There is, however, no evidence as to the source from which the payment came, and Catherine Hastings filed no defence in this action, and no claim against the premises has been made by her. *Primâ facie* the payment was made out of the trade carried on in the premises, which were assets of the deceased, and she had no claim in respect of the payments.

[Having stated the further facts and the nature of the pleadings, as set forth above, his Lordship continued :—]

Let us then see how the case stands. On the death intestate of Patrick McMahon, leaving him surviving his widow and two infant children, the premises devolved on them in equal third shares subject to paramount claims. The widow went into possession of the entire, and undoubtedly she held her children's shares as their bailiff. One of the children died in infancy, leaving her mother

(1) L. R. 10 Eq. 99.
(2) 3 Atk. 124, at p. 130.
(3) 4 Giff. 390.
(4) I. R. 2 Eq. 396.

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and the plaintiff surviving, and the share of the child so dying devolved on her mother and the plaintiff, each of whom then became entitled to a moiety of the entire. The mother, being in possession of the entire, was the bailiff for the plaintiff as to one moiety. I do not think that this position was contested, and indeed it could not be contested.

The deed of the 4th March, 1897, was, of course, invalid save so far as it affected any interest the mother could claim as the widow of Patrick McMahon. It was in derogation of the plaintiff's rights. The defendant, Maria Hastings, had full notice of this. The deed itself brings home notice to her that Patrick McMahon's estate had not been administered, and she was well aware that the plaintiff was his child. It was under these circumstances she went into possession of the infant's estate, and she thereupon became the bailiff of that estate for the infant, according to the well-established principle that a person entering upon an infant's estate with notice of his rights becomes his bailiff: *Quinton* v. *Frith* (1).

During the plaintiff's infancy the defendant, Maria Hastings, could not, so long as she remained in possession, divest herself of the character of bailiff. But the plaintiff attained the age of twenty-one years on the 28th February, 1905; and it was argued that the defendant's position as bailiff thereupon determined, and that as more than six years elapsed before the action was commenced, the 3rd section of the Real Property Limitation Act, 1874, affords a defence. The final issue is, therefore, whether the defendant ceased to hold as bailiff for the plaintiff when the latter attained her majority, or at what later date.

It is well-settled law that if a person by entering into possession of an infant's estate makes himself a bailiff of that estate, his position will not be altered by the mere circumstance of the infant coming of age. He continues to be bailiff for the infant until the relationship is dissolved by some other circumstance, or combination of circumstances: *Wall* v. *Stanwick* (2); *In re Hobbs* (3); *Maguire and M'Clelland's Contract* (4).

(1) I. R. 2 Eq. 396.
(2) 34 Ch. Div. 763.
(3) 36 Ch. D. 553.
(4) [1907] 1 Ir. R. 393.

In the present case I find no circumstance to break the relationship until we come to July, 1906. In that month the plaintiff demanded possession from the defendant, who refused to give it. This, I think, changed the character of the defendant, Maria Hastings, from that of bailiff to that of trespasser; but if it did, the event took place within six years before the action was brought, so that the time-limit has not run out against the plaintiff.

I must therefore declare that the deed of the 4th March, 1897, is null and void so far as it purported to convey anything more than the beneficial interest of the defendant, Kate Hastings, in one half of the leasehold premises; and that the plaintiff, Catherine McMahon, is entitled, subject to any paramount claims which may arise in the administration of the estates of Patrick McMahon and the deceased child, and the claims, if any, under the mortgage-deed dated the 31st December, 1883, to one undivided moiety of the said leasehold premises.

I cannot decide now whether there are any paramount claims to be discharged. The estate of Patrick McMahon has never been administered, and I do not know what claims may be made. Neither can I decide how much or whether anything is due on foot of the mortgage, because there is no one before the Court who can properly represent Michael Hastings, the assignee of the mortgage. It may be that all claims on foot of the mortgage as against the plaintiff's moiety are barred by the Statute of Limitations, but I cannot go into that question now. On representation being raised to Michael Hastings, a claim may be made in this suit on foot of the mortgage, and I will then be in a position to decide how much, if anything, is due thereon. If the plaintiff so desires, I will order a sale of the leasehold premises in lieu of a partition, and I will direct an account of the rents and profits of the premises received by the defendant.

Solicitor for the plaintiff: *John B. Lynch.*
Solicitor for the defendant, Maria Hastings: *T. J. Hunt.*

A. E. C.

Wylie, J.
1913.
March 11.

Appeal.
May 6, 7.

In the MATTER of the ESTATE of THE RIGHT HON. JAMES H. G. M. SOMERVILLE, LORD ATHLUMNEY.

Land Purchase Code—Demesne—Sale and re-purchase—Superior interest—Redemption of—Segregation of purchase-money of demesne—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *sections* 3, 16.

A., the owner of a demesne composed of parcels held under different titles, and free from incumbrances, agreed with the Land Commission for the sale and re-purchase of the demesne under the provisions of section 3 of the Irish Land Act, 1903. Part of the demesne consisted of the lands of K., held under two leases for lives renewable for ever, the rents reserved by them being paid in one sum of £47 11*s.* 9*d.* The Estates Commissioners apportioned the purchase-money of the demesne, which amounted to £17,895, between the various parcels of the demesne, and fixed the sum of £498 as representing the selling value of the lands of K. B., the owner of the said rent of £47 11*s.* 9*d.*, issuing out of the lands of K., was not represented before the Estates Commissioners when the said sum of £498 was fixed, and was, in fact, unaware of the sale of the demesne, until the sale was approaching completion. The said sum of £17,895 was sufficient for the redemption of all superior interests, leaving a large balance available for A. The redemption price of the rent of £47 11*s.* 9*d.* was fixed at £1140 by Mr. Justice Wylie, who, however, held that there was no jurisdiction to pay to B. out of the purchase-money of the demesne any larger sum than the £498 representing the selling value of the lands of K., out of which the rents issued.

Held, by the Court of Appeal (reversing the decision of Wylie, J.), that under the circumstances of the case there was no occasion to apportion the purchase-money of the demesne, and that the redemption price of £1140 was a charge on all the purchase-money of the demesne.

Motion on Notice.

At the date of the sale and re-purchase, hereinafter referred to, Lord Athlumney was the absolute owner of a demesne in the county of Meath, consisting of portions of the townlands of Flemingstown, Balrath, Burtonstown, Kentstown, and Ballymagarvey. The lands of Ballymagarvey were held for the residue of a term of 999 years from the 1st November, 1839, at the yearly rent of £100; those of Burtonstown were held under a fee-farm

grant, at the yearly rent of £416 7*s.*; those of Kentstown, comprising 30A. 3R. 35P., and through which the main avenue leading to the mansion-house ran, were held under two leases for lives renewable for ever, dated the 6th May, 1826, and the 25th October, 1826, respectively, the rents payable under which had been adjusted, and were paid in one sum amounting to £47 11*s.* 9*d.* The remainder of the demesne lands was held in fee-simple, and there were no incumbrances affecting any part of the lands.

Lord Athlumney had agreed with the Estates Commissioners for the sale to them, and re-purchase by him, of the said demesne under the provisions of section 3 of the Irish Land Act, 1903, the price originally fixed by the Estates Commissioners being £14,000, of which £400 was placed on the lands of Kentstown. The price was subsequently increased to £17,895. This sum of £17,895 was apportioned by the Estates Commissioners between the various parts of the demesne, £498 being fixed as the selling value of the lands of Kentstown.

No notice of the sale and re-purchase of the demesne, or of the segregation of the purchase-moneys thereof, was given to Sir Lionel Alexander, the owner of the rent of £47 11*s.* 9*d.*, issuing out of the lands of Kentstown, until the 15th June, 1909, when the solicitors acting for Lord Athlumney wrote to the solicitors for Sir Lionel Alexander, stating that "as the sale of this estate is rapidly approaching completion, it would be well, if possible, to endeavour to arrange the purchase-price of the head-rent of Kentstown, without having recourse to the decision of the Judicial Commissioner." As a result of the correspondence which ensued, the parties were unable to agree as to the redemption-price of the said rent, and on the 11th February, 1913, an application was made on behalf of Lord Athlumney to the Right Hon. Mr. Justice Wylie to redeem the said rent of £47 11*s.* 9*d.*, at the sum of £498. The learned Judge ordered the rent to be redeemed at the sum of £1140 (1).

(1) The judgment of Wylie, J., was as follows:—

This is an application to fix the redemption price of two rents of £44 5*s.* 9*d.* and £6 15*s.* 2*d.* payable out of those parts of the demesne lands sold in this matter comprised in the townland of Kentstown. The lands respectively

Wylie, J. 1913.

In re ATHLUMNEY'S ESTATE.

On the 11th March, 1913, Sir Lionel Alexander applied that the said redemption-price of £1140 might be provided for out of the purchase-moneys of the demesne, and placed to the separate

subject to these rents were demised by William Alexander Shaw to Sir Marcus Somerville, by two leases for lives renewable for ever, dated respectively the 6th May and 25th October, 1826. The lands so demised adjoined the Somerville demesne, and were respectively situated at the south and north side of a then existing road which, I am informed, is now, and has been since the granting of the leases, one of the main avenues into the demesne. There is a map on the later lease, which shows this, and the lease states that the lands demised were then marked out for planting by Sir Marcus Somerville. It is plain therefore, I think, that these leased lands were acquired by Sir Marcus Somerville, for the purpose, which he afterwards carried out, of incorporating them into his demesne. These two rents, having been adjusted under the Local Government Act, have been since paid in one sum amounting to £47 11*s.* 9*d.* The area of the land comprised in both leases is 30A. 3R. 35P. The original price fixed by the Estates Commissioners for the entire demesne was £14,000, of which £400 was placed on the lands of Kentstown demised by the said two leases. Subsequently, however, on an objection being lodged by Lady Mowbray, who received a head-rent out of another part of the demesne lands, a second inspection was directed by the Estates Commissioners, and the price was raised from £14,000 to £17,895, the £400, placed on Kentstown, being raised to £498. When this application first came before me, I was informed that the full purchase-money was being advanced to Lord Athlumney for the purpose of re-purchase by him, and it being immaterial to Lord Athlumney, as an absolute owner, whether the price fixed was the full selling value or the value for security only, I referred the matter to the Estates Commissioners to ascertain whether the sum of £498, the price fixed for Kentstown, was the full selling value or the value for security only. It was then open to the applicant to have applied to the Estates Commissioners to be heard on the question of price, but he has not done so, and the Estates Commissioners having by their Secretary intimated that £498 is the selling value of the lands, I must deal with the case on that basis.

Now the rent to be redeemed being £47 11*s.* 9*d.*, the entire purchase-money available for redemption amounts only to between ten and eleven years' purchase of the rent, yet the vendor asks me to fix the redemption price at £498, that being the only sum available for payment of the redemption price. But, in my opinion, it is quite settled that the amount of the purchase-money, whether it appears to be sufficient or insufficient to redeem in full a superior interest, is not the measure of the value of that superior interest, nor in any way material in ascertaining that value, except as evidence of the value of the land, which, in most cases, is the primary and most valuable

credit of the said rent of £47 11*s.* 9*d.* The rents payable out of the lands of Ballymagarvey and Burtonstown had been previously redeemed, and it was admitted that out of the purchase-moneys

security for its payment. In this case, however, there is, in addition to the security of the land, a covenant in each lease for the payment of the rent, binding upon Sir Marcus Somerville, his heirs, executors, administrators, and assigns; and with reference to the effect of this covenant as an additional security for the payment of the rent, I have been referred, by counsel for the owner of the rent, to the recent decision of the King's Bench Division in the case of *Colles* v. *Hornsby* ([1913] 2 I. R. 210), where, in a case similar to this, it was held by a majority of the Court that, notwithstanding an order for the redemption at a certain price of a rent and covenant for its payment, reserved by and contained in a lease, the right to recover any unpaid gale of such rent from the executors of the original covenantor, by an action on the covenant, continued to subsist until the full redemption price was paid. But I was not informed who are the executors of Sir Marcus Somerville, who died very many years ago, or whether there are any assets now available to satisfy a judgment against such executors. Counsel further contended, however, that the above decision covers the case of an action on the covenant under similar circumstances against a vendor who was in possession of the demised premises only under a derivative title as an assign, and who is, of course, only liable on the covenant so long as he is an assign.

It appears to me, however, that at the present stage of this case I am not concerned with the above decision or its suggested extension. I have nothing to do with the rights that may exist or be enforced in respect of the said rent in other Courts after my redemption order is made. Certain lands have been sold in this matter, and the purchase-money lodged; and looking at section 14 of the Act of 1887, section 31 of the Act of 1896, and section 24 (6) of the Act of 1903, it is clear that my duty is simply to ascertain what claims attach to the purchase-money, their amount and value, and to discharge, redeem, or satisfy the same, according to their priority, out of the purchase-money as far as it extends. In ascertaining the value of a claim in respect of a superior interest, I have to inquire into and consider not what future remedies may exist after the redemption order is made, if the redemption price is not paid, but the facts, rights, and remedies as they existed at the date of sale, and, according to my view, as if the sale had not taken place.

Now the claim that I have to value in this case is the claim to the reversion upon the two leases, to which I have referred, reserving a rent or rents now amounting to £47 11*s.* 9*d.*, and as these leases are in perpetuity at fixed rents, the value of the claim is simply the value of these rents, the sporting rights being in the tenant, and the minerals reserved. Now the value of a rent depends on the security for its payment. The first element of security to be considered is naturally the value of the land out of which it is payable, *i.e.* its

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of the entire demesne a considerable balance would remain payable to Lord Athlumney after the redemption of all superior interests.

Jellett, K.C., and *Chadwick*, for the applicant.

Poole, for Lord Athlumney.

Wylie, J.:—

I have no doubt at all as to my position on the question of jurisdiction. Mr. Jellett's client has all the merits, and ought, in equity, to be paid his £1140. My jurisdiction, as I understand it, is to distribute the purchase-money applicable to the payment of claims so far as that purchase-money will go.

Now, what is the purchase-money that is applicable to the payment of the redemption-price of the claimant's head-rents? The statute is explicit on the point. Section 16 (1) of the Act of

value as a security for the continued payment of the rent. The Estate Commissioners have fixed what they call the selling value in this case at £498, and by that figure all parties are now bound. But what I take the Estates Commissioners to mean by the "selling value," according to their usual mode of valuation, is its intrinsic value as land, if used according to ordinary methods for the production of rents and profits. That is, however, only a part of its value in this case as a security for the payment of the rent. It has been incorporated by Sir Marcus Somerville into his fine demesne. It has been planted as an ornamental part of the demesne, and through this plantation one of the main avenues runs. As long, therefore, as the demesne exists it is very unlikely that the owner of the demesne would ever give it up or submit to eviction for non-payment of rent. There is also in each of the leases, as I have said, a covenant for payment of the rent, binding not only on the executors of the original covenantor, but also on the owner for the time being, so long as he remained assignee of the leases, and, though I do not think that a possible remedy for non-payment against the executors of a person long since dead, about whose assets we know nothing, would add much to the security for the rents in the view of an intending purchaser, I think the fact that the owner of this large demesne was bound by a covenant to pay, so long as he remained assignee of the leases, would add to the security. Therefore, taking into account everything which seems to me to affect the value of this rent, which has been regularly paid for over eighty years, and having regard to the fact that the redemption is compulsory, I fix the price at £1140.

1903 provides that when the Land Commission agree to purchase any land, they may make a vesting order which shall be effectual to vest in the Commission the fee-simple of the land purchased, subject as in the section mentioned, "but, save as aforesaid, discharged from the claims of all persons who are interested in the land, and all such claims shall, as from the date of the vesting order, cease as against the land, and attach to the purchase-money in like manner as immediately before the date of the order they attached to the land." Now, to what land did this claim attach immediately before the date of the vesting order? Only to the land comprised in the two leases under which these rents were reserved. Accordingly, I have to see what was the purchase-money to which this claim attached. Plainly, it was the purchase-money representing the land comprised in these two leases. It is absolutely necessary that the total purchase-money of the demesne should be segregated into portions, so that the claims on the respective portions may be paid in their proper order of priority. Accordingly, it seems to me that, as the Estates Commissioners have fixed £498 as the portion of the purchase-money of the entire demesne applicable to the lands comprised in these two leases, that is the only purchase-money available to pay the redemption-price of those headrents. That meets Mr. Jellett's point, that he is entitled to have his redemption-price paid out of the purchase-money of the entire demesne.

I accordingly refuse the motion, and declare that the redemption-price of the headrents is to be paid out of the £498, so far as it will go. I will retain £1200 in Court for a reasonable time in order to enable Mr. Jellett to assert any legal or equitable right he may have to obtain payment of the full amount of his claim. As to the question of costs, I will not give him the costs of the motion; but, at the same time, I will not order his client to pay the vendor's costs. I will declare him entitled to all his costs in the matter, save the costs of the motion, to be paid by the vendor.

J. E. W

Appeal. 1913.

In re ATHLUMNEY'S ESTATE.

Sir Lionel Alexander appealed to the Court of Appeal (1).

Jellett, K.C., and *Chadwick*, for the appellant:—

We contend that the demesne here was a single unit, sold and re-purchased as such at a single price, and that there should have been no segregation of the purchase-money. Cases may arise where various incumbrances affect various parts of a demesne held under different titles, and where, if the purchase-money of the demesne be insufficient to redeem all the incumbrances in full, it may be necessary to segregate the purchase-money. Here there are no incumbrances, and Lord Athlumney is the absolute owner. The net question then arises, Can he, by going through the form of selling and re-purchasing his demesne, remaining in possession thereof throughout, effect the redemption of an amply secured head-rent at a figure which is admittedly quite inadequate, while at the same time receiving a large balance of the purchase-money? We contend that that balance is available to meet the entire redemption-price of £1140; otherwise the fixing of the redemption-price of the rent at that sum was wholly illusory. The appellant cannot sue on the covenants for payment of the rent contained in the original leases, as was done in *Colles* v. *Hornsby* (2). Here there are no personal representatives of the original covenantor in existence, nor would it be possible to trace assets of his. We cannot sue Lord Athlumney on the covenants as assignee of the lands, as he has parted with his estate in them to the Estates Commissioners. Therefore the Judicial Commissioner, who is entrusted with the distribution of the purchase-money, and who has himself fixed the redemption-price at £1140, should pay that sum out of the purchase-money available to meet it. It is a fallacy to say that we cannot be paid more than the selling value of the lands of Kentstown. These lands were incorporated with the demesne, and formed an essential part of it. The possession and control of each part of the demesne gave an enhanced value to all. See judgment of Lord Watson in *Cooper Essex* v. *Local Board for Acton* (3). The avenue and

(1) Before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.
(2) [1913] 2 I. R. 210. (3) 14 A. C. 153 at 167.

ornamental timber had practically no selling value. No one would buy an avenue leading to a mansion-house, just as no one would buy the hall of a house, no matter how valuable the house itself might be. *In re Borrowes's Estate* (1) will be relied on by the other side; but there the segregation of the purchase-money took place at the request of the owner of the head-rent there in question. Here Sir L. Alexander was not even aware of the sale of the demesne. The Estates Commissioners must themselves have originally looked upon the purchase-price of the demesne as one sum, available for the redemption of the superior interests, else they could never have arrived at the conclusion, having regard to all the circumstances of the case, including the redemption of the superior interests, that the agreed price was equitable as between all the parties.

Chaytor, K.C., and *Poole*, for the respondent:—

We submit that the order of Mr. Justice Wylie was clearly right. Under section 16 of the Irish Land Act, 1903, when the Land Commission, having agreed to purchase "any land," make a vesting order, that order is effectual to vest in the Land Commission the fee-simple of the lands "discharged from the claims of all persons who are interested in the land, whether in respect of superior or intervening interests or incumbrances or otherwise," whereupon "all such claims shall, as from the date of the vesting order, cease as against the land and attach to the purchase-money in like manner as immediately before the date of the order they attach to the land." It follows that, once the vesting order was made, the claim of Sir L. Alexander in respect of his head-rent ceased as against the lands of Kentstown, out of which it issued, and attached to the purchase-money, but only in like manner as immediately before the date of the order it attached to the land, that is, the lands of Kentstown. It was, accordingly, absolutely necessary that the purchase-money of the demesne should be segregated, so as to prevent the owner of any superior interest being paid his redemption-price out of the proceeds of the sale of lands to which he had no claim. The word "demesne,"

(1) [1911] I. I. R. 218.

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occurring in section 3 of the Act of 1903—which enables the Land Commission to purchase from the owner of an estate who has entered into purchase agreements "any demesne or other land"—is an adjective, and does not point to the demesne as the unit of the purchase. The Land Commission were not bound to purchase the entire demesne. They could have purchased any portion of it at a price representing its selling value. The fact that, in the present case, the Land Commission purchased the entire demesne does not entitle the appellant to receive more than the purchase-moneys applicable to the lands held under him. The decision of this Court in *In re Borrowes's Estate* (1) recognizes the necessity to segregate the purchase-moneys of a demesne sold and re-purchased under section 3. If the appellant's argument be correct, the elaborate arguments and judgments in that case, and in the resulting action of *Colles* v. *Hornsby* (2), were entirely unnecessary, as Mr. Colles could have applied to be paid his redemption-price out of the surplus purchase-moneys of the demesne.

The alleged hardship cannot affect the question. It has never been suggested in the case of a superior interest affecting part of an agricultural estate that the redemption-price can be paid out of the purchase-moneys of the estate as a whole, and there is no distinction between the sale of such an estate and the sale of a demesne: *Daly's Estate* (3). This is really an attempt to increase the purchase-price of the lands of Kentstown; but the question of value is one for the Estates Commissioners alone. If the appellant was dissatisfied, he should have applied to be heard before the Estates Commissioners on the question of value. Having done nothing, it is too late for him now to object.

May 7. THE COURT OF APPEAL made the following order:—

The Court being of opinion that the Irish Land Commission purchased from Lord Athlumney his demesne as a whole under a single contract, and at a single price, and it appearing that no application was made to the Irish Land Commission by any person interested in the said demesne as owner of a superior interest or

(1) [1911] 1 I. R. 218; 227.
(2) [1913] 2 I. R. 210.
(3) [1912] 1 I. R. 493.

incumbrance to apportion the purchase-money thereof between different parcels of the demesne, and there being no necessity in these circumstances to apportion the purchase-money as aforesaid, the Court doth declare that the redemption-price of the two rents of £44 5*s.* 9*d.* and £6 15*s.* 2*d.*, payable in respect of certain parcels of the demesne, is charged on all the said purchase-money, and doth order that the said order, dated the 11th day of March, 1913, do stand discharged, and that this matter do stand remitted to the Right Hon. Mr. Justice Wylie to proceed therein as, having regard to the foregoing declaration, to justice may appertain.

Solicitors for the appellant: *Longfield, Kelly, & Armstrong.*
Solicitors for the respondent: *Barrington & Son.*

R. ST. J. C.

IN THE MATTER OF THE ESTATE OF RICHARD NUNN.

Ross, J. 1913. April 30.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *section* 48 (1) *—Estate for sale solvent as to the fee, but insolvent as to subsisting life estate—Bonus.*

An estate sold under the Land Purchase Acts was solvent as to the fee, but insolvent as to the life estate of the vendor:

Held, that the estate was so incumbered that the vendor was not entitled to receive for his own use any part of the rents or profits thereof, within the meaning of the proviso to section 48 (1) (1) of the Irish Land Act, 1903, and that the bonus should be added to the purchase-money, and not paid to the vendor.

OBJECTION to the final schedule of incumbrances.

The originating application in the matter was lodged on the 15th January, 1906, and the purchase-money amounted to £28,745 cash and £57 Guaranteed 3 per cent. Stock. At the date

(1) The material part of the proviso to section 48 (1) of the Land Act, 1903, is as follows:—"Provided that, where an estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents or profits thereof . . . . the percentage shall be added to the purchase-money, and shall not be paid to the vendor."

Ross, J. 1913.

In re NUNN'S ESTATE.

of the lodging of the originating application, the charges on the fee of the lands for sale amounted to the sum of £1400.

A receiver had been appointed over the lands in 1887, and since then the rents and profits of the lands had been wholly insufficient to meet the estate outgoings and interest on incumbrances and annual premiums on policies charged on the vendor's life estate in the lands, and for the last twenty-five years no interest had been paid on the last two incumbrances thereon, nor had the vendor, who was tenant for life of the lands, received any rents or profits out of the lands. The bonus amounted to £3323 15*s.* 1*d.*

The objector, Edward Westby Nunn, who was an executor of an incumbrancer on the life estate, and had by an order of the King's Bench Division been appointed receiver by way of equitable execution over any bonus coming to the vendor, contended that the proviso to section 48 (1) of the Land Act, 1903, did not apply, and that the bonus was payable to him, and should not be added to the purchase-money.

S. L. Brown, K.C., and *Longfield*, for the objector :—

Assuming the life estate of the vendor to be insolvent, that does not matter so long as the income of the lands is sufficient, as it is here, to pay the interest on the incumbrances on the fee.

The "estate" that is being sold here is solvent. Section 48 (1) cannot mean that, when the life estate is insolvent by reason of charges put on it by the owner of the life estate, but the fee is solvent, the bonus is not payable to the vendor. It is not the life estate that is sold. The "estate" in section 48 (1) is the fee: *In re Bandon's Estate* (1). The owner of an insolvent life estate would never sell if he did not get the bonus. If the fee is solvent, why add the bonus to the purchase-money, with the result that the remainderman gets the bonus, and the tenant for life, who is selling, gets nothing? "Vendor" in section 48 (1) is not the vendor of a tenancy for life, but the vendor of the fee. If the vendor is absolute owner, then he does not get the bonus, if he

(1) [1907] 1 I. R. 226.

has so encumbered the estate as to make his own interest valueless; but when the vendor is a tenant for life who sells the fee, the statutory premium for selling should become his own property.

H. R. Poole, for the incumbrancers on the fee:—

The tenant for life has received nothing for nearly thirty years. "Estate" in section 48 (1) means the lands for sale: *In re Foster's Estate* (1); *In re Bandon's Estate* (2).

H. D. Conner, K.C., for other incumbrancers on the fee:—

The proviso in section 48 (1) deals with the question of income only, irrespective of the distinction whether it arises from the fee, life estate, or any other interest.

Frank FitzGibbon, for the public trustee.

Ross, J.:—

In this case the objector is a judgment creditor who has obtained an order appointing him receiver by way of equitable execution over the bonus if payable to the tenant for life, and by his objection to the final schedule of incumbrances claims payment of the same on the ground, as alleged in the objection, that the estate was not (in the words of section 48 (1) of the Land Act, 1903) so incumbered that the vendor was not entitled to receive for his own use any part of the rents and profits.

The objector's contention is that, although the life estate is hopelessly insolvent, so long as the purchase-money of the inheritance when sold is more than sufficient to pay off the incumbrancers, the percentage is not to be added to the purchase-money, but must be handed over to the creditors of the insolvent tenant for life. If the sub-section were capable of effecting such an absurdity, it would require the urgent attention of the Legislature.

The word "estate" in the Act of 1903 has not always the same meaning. Sometimes it means the lands contracted to be

(1) [1912] 1 I. R. 424. (2) [1907] 1 I. R. 226.

Ross, J. 1913. *In re* NUNN'S ESTATE.

sold, sometimes the "estate" as declared by the Estates Commissioners, sometimes the interest of the vendor in the lands. But, whatever it means, this much is very plain, that the sub-section is conversant with income, and that, when the existence of the incumbrances prevents the vendor from receiving any of the income, the percentage is not to go to him, but is to be added to the purchase-money. I direct accordingly, and overrule the objection.

Solicitors for the objector: *Orpen & Sweeny.*

Solicitors for the incumbrancers on the fee: *B. Thompson & M'Neill.*

Solicitors for other incumbrancers: *S. S.* and *E. Reeves & Son.*

Solicitor for the public trustee: *J. M. Ross Todd.*

D. M. S.

Appeal. 1913. April 27. May 5.

IN THE MATTER OF THE EVICTED TENANTS (IRELAND) ACT, 1907, AND THE ESTATE OF THOMAS ST. JOHN GRANT, THE SUPPOSED OWNER OF LANDS.

Compulsory purchase—Evicted Tenants (Ireland) Act, 1907—Price—Estates Commissioners—Offer—Section 2, sub-section 4—Bonus.

In estimating the amount to be offered under the Evicted Tenants (Ireland) Act, 1907, for the compulsory acquisition of lands, the bonus which may possibly be payable in respect of the sale is not to be taken into consideration.

APPEAL (by leave of Mr. Justice Wylie) from an order of his Lordship, sitting as Judicial Commissioner, dated the 4th February, 1913, on the following question of law:—"That the Judge, in estimating the price to be paid by the Estates Commissioners for the purchase of the lands to be acquired in this matter, was wrong in taking into consideration the fact that the vendor would obtain the percentage payable under section 48 of the Irish Land Act, 1903, in addition to the purchase price offered by the Estates Commissioners."

The curial part of the order appealed against was as follows:—

"Whereas the owner, being aggrieved by the determination of the Estates Commissioners as to the price of the lands proposed to be compulsorily acquired under the provisions of the said Act" (*i.e.*, Evicted Tenants (Ireland) Act, 1907, mentioned in title of matter), "appealed therefrom to the Judicial Commissioner, whereupon and on reading, &c., and hearing, &c., the Court doth dismiss the said appeal."

The Estates Commissioners were proceeding in the present matter to acquire compulsorily the estate of the owner in the lands of Inchinhanna west, in the Co. Waterford, containing 63A 1R. 25P., all in owner's possession, poor law valuation being £63 10*s*. There was no question as to the regularity of the Commissioners' proceedings, the only difference being with regard to price. The owner's valuers estimated the price at £1900 cash. The Estates Commissioners, on the 15th October, 1912, offered £1222, and subsequently on the 23rd December, 1912, £1350 payable in Guaranteed 3 per cent. Stock, equal in nominal value thereto. The vendor, being still dissatisfied, appealed to the Judicial Commissioner, with the result above stated.

Counsel for the owner, in opening the present appeal, alleged that Wylie, J., had acted on an erroneous principle in taking the bonus into consideration in fixing the price.

By direction of the Court of Appeal the Registrar wrote the following letter of inquiry:—

"HIS MAJESTY'S COURT OF APPEAL IN IRELAND.

"28th April, 1913.

"ESTATE OF T. ST. JOHN GRANT.

"My dear Mr. Justice Wylie,

"With reference to an appeal from an order of the Irish Land Commission in the above matter, dated 4th February, 1913, which is at hearing before the Court of Appeal, I have been directed by the Court to write to your Lordship in order to ascertain:—

"I. Whether the Judicial Commissioner, or the Estates Commissioners, took into account, in fixing the purchase price, the fact that a percentage under section 48 of the Land Act, 1903, would be payable in respect of the sale?

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"II. If so, at what amount they assumed that such percentage would be fixed?

"III. How much, if any, they deducted from the purchase price in respect thereof?

"The Court of Appeal deemed it preferable to drawing up a formal order that I should communicate with your Lordship by letter.

"I am, my Lord,

"Yours faithfully,

"R. C. de VERSAN.

"RT. HON. MR. JUSTICE WYLIE,

"The Elms, Merrion Avenue,

"Blackrock."

The following answer was received from Mr. Justice Wylie:—

"ESTATE OF ST. J. GRANT.

"My dear de Versan,

"As to the questions you have put to me in this—

"My answer to Q. 1 is—Yes.

"My answer to Q. 2 is—That according to my recollection the figures worked out the bonus at 12 per cent.

"I can answer Q. 3 best by stating how I arrived at what I considered the 'reasonable price' of the land.

"I first fixed what upon the facts and evidence of the case I considered to be the full value of the land to the owner in cash. I then ascertained what amount of Stock, at the price of the day, with the cash bonus added, would be equal to such full value in cash. The amount of Stock so ascertained I considered to be the 'reasonable price' which the Vendor should get under the Act.

"Whatever price I fixed, the Vendor would be obliged to take it in 3 per cent. Stock at par; and my reason for giving him Stock equivalent to my cash value was because the land was being taken *compulsorily* at the price fixed.

"Yours faithfully,

"J. O. WYLIE."

A communication, as follows, was also received from the Estates Commissioners :—

"ESTATES COMMISSIONERS' OFFICES,
"IRISH LAND COMMISSION,
"UPPER MERRION STREET, DUBLIN.
"3rd May, 1913.

"ESTATE OF T. ST. JOHN GRANT.

"Dear Sir,

"The Estates Commissioners are informed that the Court of Appeal desires them to reply to the following questions :—

"(1) Whether the Judicial Commissioner, or the Estates Commissioners, took into account, in fixing the purchase price, the fact that a percentage under section 48 of the Land Act, 1903, would be payable in respect of the same ?

"(2) If so, at what amount they assumed that such percentage would be fixed ?

"(3) How much, if any, they deducted from the purchase price in respect thereof ?

"I am directed by the Estates Commissioners to say that their answer to Question (1) is in the negative. Questions (2) and (3) accordingly do not arise.

"Yours faithfully,

"JOHN T. DRENNAN,
"Registrar to the Estates Commissioners.

"R. C. de VERSAN, Esq.,
"Registrar, Court of Appeal,
"Four Courts, Dublin."

Conner, K.C., and *Farran*, for the appellants :—

The statutory duty of the Estates Commissioners under section 2, sub-section 4, of the Evicted Tenants (Ireland) Act, 1907, is to make an offer to the person, appearing to them to be the owner of the land, for the purchase thereof at such price as appears to them *prima facie* to be a reasonable price. If we turn to earlier provisions in the Land Purchase Code as to price, we find in the Irish Land Act, 1903, section 1, sub-section 2, in cases not coming within the zones, that the Land Commission may, when satisfied with the security, and after hearing all the persons

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interested, sanction the advance if they consider the agreed price to be equitable, having regard to the interests of all such persons.

Then, in section 5 of the same Act, in cases to which section 1 (1) does not apply, in making the advance they are to satisfy themselves that under all the circumstances of the case the agreed price is equitable; and in cases coming under section 6 of that Act they are, under sub-section 1, in estimating the price, to have regard to the preceding provisions of the Act in respect of the advances, and to the prices which tenants and others are willing to give for holdings and other parcels of land in the estate. In none of these cases is any reference made to the bonus or percentage which may come to the vendor under section 48. In fact, the bonus is something quite different from the price. It is not necessarily payable to the person entitled to the price, as in the cases of settled estates or insolvent estates.

The bonus was introduced as an inducement, because the price was generally not attractive enough. Further, when the Estates Commissioners are making the offer, it cannot be known whether a bonus will be payable at all. Under these circumstances we submit that Wylie, J., proceeded on a wrong principle.

Jellett, K.C., *De Renzy*, K.C., and *James Little*, for the Land Commission:—

In construing the Act of 1907, distinction must be taken between cases of voluntary sales and sales effected under the compulsory powers. The prices would plainly not be the same, therefore the *primâ facie* "reasonable price" in section 2, sub-section 4, cannot have the same meaning that is to be given to "a price which appears to them" (the Estates Commissioners) "to represent the value thereof," *i.e.* "of the land." "Reasonable," in connexion with "price," only appears elsewhere in the Purchase Code in section 40 of the Land Law (Ireland) Act, 1896, and there it is linked with "just." In sub-sections 6 and 14 of section 2 the term used is "purchase-money," not "price."

The scheme of compulsory purchase under the Evicted Tenants' Code is that the vendor should get reasonable compensation for what is taken from him, and no more. See judgment

of FitzGibbon, L.J., in *The King* (*Clanricarde*) v. *Estates Commissioners* (1). When a price is fixed as the sum to be offered, that must mean that the figure in stock is to be equivalent to the cash plus the bonus. Any reasonable offer must be based on a consideration of the bonus.

O'BRIEN, L.C. :—

This case comes before us on an appeal from an order of Mr. Justice Wylie, his position being that he was asked as an appellate tribunal under section 2 (8) of the Evicted Tenants (Ireland) Act, 1907, to consider the decision of the Estates Commissioners as to the amount of the purchase-money of lands taken compulsorily. At first when this case came before us we were rather in the dark as to the exact view taken by the Estates Commissioners, but Mr. Justice Wylie, in reply to a communication which we have sent him, has explained the exact position.

With regard to the functions and jurisdiction of the Estates Commissioners, it has been decided that in dealing under section 2 (4) with objections to their compulsory acquisition of lands they are acting judicially, and cannot base their judgment on anything except judicial reasons. In fixing the purchase price in this case I think the Estates Commissioners acted rightly, and adopted right principles. We have inquired whether they, in fixing the purchase-money, took into account the fact that the bonus would be payable, and they answered, "No." In proceeding upon that view it seems to me that the Estates Commissioners were clearly right. There is a marked difference in section 48 of the Irish Land Act, 1903, between the bonus, and the purchase-money, which is not bonus. In some cases the bonus is to be paid to the vendor; in others it is to be added to the purchase-money; but, whatever it is, unquestionably it is no part of the purchase-money. It has been decided that when, under the Act of 1907, lands are taken compulsorily, a bonus is payable. Does that make it an element to be taken into account in arriving at what is a reasonable price to be offered under section 2 (4) of the Evicted Tenants Act of 1907? At the time

(1) [1909] 2 I. R. 542, 556, at pp. 576, 577.

Appeal. 1913. *In re* GRANT'S ESTATE. O'Brien, L.C.

when the purchase-money is fixed by the Estates Commissioners it may not be known whether or not a bonus will be payable. What the Estates Commissioners are to do is to fix a reasonable price for the land they propose compulsorily to acquire. That must mean, in my opinion, the price which the owner might reasonably expect to obtain at a voluntary sale if no bonus was payable. The Estates Commissioners having acted on what I consider to be a right principle, an appeal was taken to Mr. Justice Wylie, who appears to have considered that the Estates Commissioners were wrong in not taking the bonus, in some way, into consideration. We think that this view is erroneous. The case must be sent back to the learned Judge, with our intimation that, in fixing the purchase price, the bonus should not be taken into consideration.

HOLMES, L.J. :—

I was rather puzzled at first when the case came before us, because I thought it scarcely possible that Mr. Justice Wylie made the bonus part of the basis of his decision in fixing what would be a reasonable price. I thought his reference to the bonus might have been only matter of observation. But his answer to the question we put is clear. That question, as formulated by Mr. de Versan in compliance with the direction of the Court, was, 1, "Whether the Judicial Commissioner took into account in fixing the purchase price the fact that a percentage under section 48 of the Land Act, 1903, would be payable in respect of the sale?" and the answer of the learned Judge is: "My answer to question 1 is—'Yes.'"

I am satisfied that this is an error in law. In the first place, at the time when the offer was made, and when what was a reasonable price was considered, it was impossible to say whether there would be any bonus, or to whom that bonus, if it were payable, would be paid; and how can it be said that in fixing the purchase-money that was to be taken into account?

The Estates Commissioners, in answer to the same question, say that they did not take it into account.

When both tribunals differ so much in method, though the result arrived at by both is the same, we think it right to remit

the matter to Mr. Justice Wylie, so that he can modify his order. In his answer to question 3, the learned Judge mentions how he arrived at the reasonable price; but that does not affect the appeal before us, and we give no intimation of our opinion on that point.

Holmes, L.J.

Cherry, L.J.:—

I think the Estates Commissioners were perfectly right in the manner in which they proceeded to fix the price in this case. They are directed by the Act of Parliament to fix "a reasonable price"—that means, in my opinion, such a sum in cash as the vendor would be likely to obtain for his land upon a voluntary sale in the open market. No doubt the Estates Commissioners have a very wide discretion in the matter, but they are not at liberty to deal with the percentage payable under section 48 of the Act of 1903 as if it were part of the purchase-money. It may be, and frequently is, payable to a person who is not owner of the estate at all, as in the case of a tenant for life selling under the powers conferred upon him by the Settled Land Acts. Even in the cases of insolvent estates it is treated as distinct, though it is directed to be added to the purchase-money. At the stage when the purchase-money is fixed, no one can tell whether any percentage at all will be payable, and, if payable, to whom it will be paid. In every case it is dealt with as being something distinct from the purchase-money. How, then, on a compulsory sale in fixing a reasonable price can it be deemed to be part of that price?

Solicitor for the owner: *W. F. St. Leger.*
Solicitor for the Irish Land Commission: *W. Alexander.*

W. G.

Ross, J.
1913.
Feb. 12, 25.

PURSER *v.* PURSER.

Husband and wife—Agreement for future separation—Validity of agreement.

The plaintiff was the defendant's wife. The defendant was guilty of continuous acts of cruelty to the plaintiff. Divorce proceedings were taken by the wife against the husband. On the case coming to trial a consent was entered into by the parties for the execution of a settlement. The deed of settlement was executed by the parties, and provided that the wife should live with the husband, and, *inter alia*, it was provided that, in the event of future disagreement and separation, the husband should pay to the wife the weekly sum of £1 10*s*. After the execution of the settlement, the husband and wife lived together, but subsequently, owing to acts of cruelty by the husband, she refused to live with him.

An action having been brought by the wife against the husband to enforce the provision of the deed of settlement, for the payment to her of the said weekly sum, the defendant pleaded that such provision was void, as being contrary to the policy of the law.

Held, for the plaintiff, on the ground that the dominant purpose of the settlement was to put an end to an existing separation.

TRIAL OF ACTION.

The facts of the case and the arguments sufficiently appear in the judgment of Ross, J.

Serjeant Moriarty, K.C., *Serjeant Matheson, K.C.*, and *The Hon. Cecil Atkinson*, for the plaintiff.

P. Lynch, K.C., and *Norwood*, for the defendant.

Hungerford, for the trustees of the settlement.

The following cases were referred to in the arguments:—*Jodrell* v. *Jodrell* (1); *Wilson* v. *Wilson* (2); *M'Gregor* v. *M'Gregor* (3); *Harrison* v. *Harrison* (4); *In re Hope Johnstone* (5); *Bracey* v. *Sherwin* (6); *Bishop* v. *Bishop* (7); *Marlborough* v. *Marlborough*; (8); *Rodney* v. *Chambers* (9); *Vandergucht* v. *De Blaquiere* (10).

(1) 9 Beav. 45.
(2) 1 H. L. C. 538.
(3) 21 Q. B. D. 424.
(4) [1910] 1 K. B. 35.
(5) [1904] 1 Ch. 470.
(6) 55 S. J. 330.
(7) [1897] P. 138.
(8) [1901] 1 Ch. 165.
(9) 2 East, 297.
(10) 5 Myl. & Cr. 229.

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Feb. 25.

Ross, J. :—

The plaintiff, Norah Mary Purser, with whom is joined her son, John Lyons Purser, an infant, claims against her husband, the defendant, George Harwood Purser, and two other defendants, trustees of a settlement dated 7th September, 1911, that certain moneys due under the settlement may be paid to her, and future instalments provided for.

The plaintiff, Norah Purser, was married to the defendant, George Purser, in 1898. They went to reside in England, where the only child of the marriage, John Lyons Purser, was born in 1904. The husband was guilty of continuous acts of cruelty to the wife, almost from the time of the marriage. In December, 1906, she obtained from the justices of Middlesex a protection order, under which she became entitled to the custody of the child and to a weekly sum of £2. She then returned to Ireland, where she lived with her child. A deed was executed in 1909, under which the husband undertook to provide a home for his wife and himself in Ireland. The deed contained clauses providing for the wife in case of another separation. They then resumed cohabitation, but the husband treated the wife with persistent cruelty, as before. On the 4th June, 1910, the wife filed a petition in Ireland, praying for a divorce *a mensa et thoro* on the ground of cruelty. The suit came to a hearing before a Judge and jury in Dublin, on 13th, 14th, and 15th June, 1911, when a consent was entered into upon terms, afterwards embodied in the post-nuptial settlement which I am now called on to enforce.

The settlement contained recitals of the facts which I have stated. It recited that the parties had agreed that all proceedings should be stayed upon the following terms and conditions :— That the wife should resume cohabitation ; that the husband should pay to the trustees of the settlement £2500 ; that the income should be paid to the husband for life, then to the wife during widowhood for the maintenance of herself and her child, then to be held for the benefit of the child, with an ultimate trust in favour of the husband in the event of the death of the child or wife, or her second marriage. The deed goes on to declare that

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in the event of future disagreements the wife should be at liberty to live apart; that from the date of such disagreement and separation the husband should pay her weekly the sum of £1 10*s.*; that she should be entitled to the custody of the child, and should be at liberty to bring him up in the Roman Catholic faith. The said weekly sum was charged by the husband upon the income of the fund, and he directed the trustees, in the events provided for, to pay it out of the income to the wife.

After the execution of the deed, the husband began to treat the wife with cruelty, as before. On the 3rd April, 1911, he managed to get the child into his possession, and took him to England; but he subsequently restored him to her custody. After the incident of the 3rd April, the wife refused to live with her husband at all. He, on the other hand, has absolutely refused to pay any of the weekly sums he covenanted to pay under the settlement. She claims to be entitled to these sums from the 3rd April, 1911. The defendant, George Purser, though in Court during this trial, has not ventured to enter the witness-box. The grave charges made by the wife are not contradicted, and must be taken to be admitted in full. He relies solely on a point of law that the agreement to pay these instalments in the event of a separation is an agreement contrary to the policy of the law, and therefore void. One would imagine that it was contrary to the policy of the law to allow a husband who had broken the covenants in the settlement to escape from his liability. The answer to this is, I suppose, that, if the covenants broken are contrary to the policy of the law, the contracting party has a right to disregard them.

This leads us to consider what is the true meaning of the phrase "the policy of the law." The expression is used in cases where an agreement, though in all other respects binding upon the parties, is not carried into effect by the Court, because the enforcement of such agreements is supposed to have an injurious effect on public morality. Who is to decide when such enforcement would be attended with injury to the principles and conduct of the community? Obviously the judicial tribunals. Here it is to be observed that the opinions of Courts on the policy of the law are not constant. They alter in consequence of political

and religious change, and they are modified to follow the supposed policy of certain codes of laws, such as the divorce legislation. The domain of morality is not, and has never been in any country, if we except the Jewish theocracy, the same as the domain of State Law. The domain of morality is infinitely wider. It is comprehensive of all the acts and the thoughts of man. Its objects and its sanctions are wholly different. The domain of State Law is necessarily circumscribed. It is possible for a man to be ethically worthless: to be mean, cruel, treacherous, malignant, heartless, and irreligious, and yet he may never have broken any law, civil or criminal.

There are, however, some matters arising in the wide circle of morality to which the State Law must have some regard. There are certain well-recognized cases where the State Law will refuse its aid to enforce agreements apparently just and proper as between the parties, on the ground that they are contrary to what is called the policy of the law. The matter I have now to deal with is an apt illustration.

It is in the interests of morality, and to the advantage of the community, that the marriage contract should be preserved, and that the husband and wife should live together in the home, and that every agreement to the contrary should be held void. This was for a long time deemed to be the policy of the law; but as time went on ecclesiastical change, and public demands consequent thereon, brought about considerable alteration in judicial opinion. The universality of the proposition is no longer maintainable.

Before the Reformation, marriage was regarded by the Church and by the law as a matter of sacramental obligation. Therefore all covenants for separation were invalid, as being contrary to the policy of the law. After the Reformation, the rules of the ecclesiastical law were only allowed to prevail in so far as they were not contrary to the Common Law. Deeds providing for voluntary separation were not prohibited by the Common Law, and were thenceforth to be regarded as not contrary to the policy of the law. But, as pointed out by Lord Westbury in *Hunt* v. *Hunt* (1), it was a very long time before

(1) 4 de G. F. & J. 221.

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this was fully recognized. The validity of such deeds was not established till the decision of *Wilson* v. *Wilson* (1) by the House of Lords in the middle of the nineteenth century. It is now the law that an agreement by a husband and wife to live apart is valid and enforceable if followed by an immediate separation.

We now come to consider the validity of an agreement contemplating a future separation. It is said that it provides an inducement to separation, and is therefore void. Is it the law that an agreement containing any provision for a future separation is void under any circumstances? The decisions have never gone to that length. There have been acute differences of judicial opinion on the subject. In *Rodney* v. *Chambers* (2) a covenant providing for a separate maintenance for the wife, in the event of a future separation, was held good. In *Durant* v. *Fitley* (3) it was held good in the Court of Exchequer, and bad in the Exchequer Chamber. In *Westmeath* v. *Salisbury* (4) the Irish Court of Chancery held such a provision illegal, and an appeal having been brought to the House of Lords upon other grounds, so that the question was not before the House for decision, Lords Eldon and Lyndhurst expressed very decided opinions against the legality of such provision for future separation. "There are, no doubt, says Lord Cottenham in *Vandergucht* v. *De Blaquiere* (5), shades of distinction between the circumstances of those cases and some facts in this case which differ from them all, and particularly in this—That the agreement providing for future separation was not entered into when the parties were living together, but was the price and condition of terminating a state of separation." These last words have a distinct bearing upon the case before me. When a husband and wife are living together, a covenant providing for a future separation does appear to constitute a kind of inducement to separation. But when they are living apart, it may be the only method by which a reconciliation can be effected. If this is its object, it certainly ought not to be regarded as contrary to the policy of the law. When we

(1) 1 H. L. C. 538.
(2) 2 East, 297.
(3) 7 Price, 577.
(4) 5 Bligh (N. S.), 339.
(5) 5 Myl. & Cr. 229.

look upon the covenant as a method by which a reconciliation is effected, we cannot reject the bad part of it and retain the good.

The clause must be taken as a whole; and the question is this, whether its true intent is to put an end to an existing separation, or to afford an inducement to a future separation. We must not overlook the other side of the account. Suppose there was no such covenant, its absence would be an inducement to cruelty. The husband can drive the wife out and yet incur no liability.

I am of opinion that in this case the dominant purpose of the covenant was to put an end to an existing separation. I must accordingly decree that it be enforced.

I shall direct that the full amount of the instalments is to be paid by the defendant if he has received the interest, or out of the settled fund if he has not, from the 4th April, 1911, but the defendant is at liberty to set off the amount of the costs due to him by the wife in other proceedings referred to in the defence. I shall declare the said weekly sums well charged on the future income of the fund, and direct the trustees to pay them to the wife as they accrue. The defendant must also pay the costs of the plaintiff and the costs of the trustees incurred in these proceedings.

Solicitors for the plaintiff: *Wynne & Wynne.*
Solicitors for the defendant, Purser: *Babington & Clarke.*
Solicitor for the trustees: *J. J. Mooney.*

D. M. S.

Appeal.
1913.

MACMAHON *v.* MACMAHON. PURSER *v.* PURSER (1)

May 14, 15.
June 13.

Contract—Public policy—Husband and wife—Separation deed—Agreement providing for immediate reconciliation and for the contingency of future separation.

An agreement entered into between a husband and a wife while living separate and apart, providing for their resuming cohabitation, and further that, in the event of a future separation, provision should be made for the wife, is legal and enforceable.

The defendant in *MacMahon* v. *MacMahon* (2), and the defendant in *Purser* v. *Purser* (3), having appealed to the Court of Appeal, the two appeals were heard in immediate succession. The question in each case was, whether an agreement entered into between a husband and wife, whilst living apart, providing for a reconciliation and the resumption of cohabitation, and also containing terms that in case of a future separation separate maintenance should be provided for the wife, was enforceable, or whether such an agreement is void as being against public policy.

H. Wilson, K.C., and *P. A. O'C. White*, for the appellant, in *MacMahon* v. *MacMahon* (2):—

We contend that this contract was invalid as providing for a future separation, and thereby contravening the policy of the law. The principle is stated in Pollock on Contracts (8 ed. p. 325): "As to all agreements or provisions for a future separation, whether post-nuptial, or ante-nuptial, and whether proceeding from the parties themselves, or from another person, it remains the rule of law that they can have no effect. If a husband and wife who have been separated are reconciled, and agree that, in case of a future separation, the provisions of a former separation

(1) Before PALLES, C.B., and HOLMES and CHERRY, L.JJ.
(2) Reported *ante*, p. 154. (3) Reported *ante*, p. 422.

deed shall be revived, this agreement is void." See also Macqueen on Husband and Wife, c. xii, s. 3. The authorities on the point are clear: see *Durant* v. *Titley* (1). In *Westmeath* v. *Salisbury* (2) the judgment of Lord Eldon is explicit that an agreement providing for future separation is void. In *Cocksedge* v. *Cocksedge* (3) it was held that a covenant before marriage that the husband should make a certain provision for his wife in case of separation taking place between them was invalid. *Bateman* v. *Countess of Rosse* (4) shows that a reconciliation entirely does away with the effect of a separation deed. Lord Eldon there laid down that a husband and wife could not be permitted to make an agreement to hold good whenever they chose to live apart. In *Cartwright* v. *Cartwright* (5) Knight-Bruce, L.J., said, "I apprehend the theory of the law to be, that a man and his wife cannot live in a state of separation from each other (in the only sense, or in either of the only senses, in which that term can possibly be understood here) without some failure on the part of one or both in the performance of duties in the fulfilment of which society has an interest. Here certain rights in property have been conferred by an ante-nuptial settlement on the intended husband and the intended wife, in the event of the marriage taking place, subject to a proviso for materially varying those rights in a manner favourable to the husband if a separation, by reason of any disagreement or otherwise, should take place. Understanding that term as I have already stated, I am of opinion that such a proviso is against public policy, and therefore void." The decision of Page Wood, V.-C., in *H.* v. *W.* (6) is to the same effect. The effect of these cases cannot be got rid of by suggesting that the primary object of the deed was to effect a reconciliation. That cannot validate a covenant to take effect only in case of future separation. *Wilson* v. *Wilson* (7) only recognized the validity of an agreement for an immediate, not a future, separation. The decision in *Harrison* v. *Harrison* (8) cannot be pressed

(1) 7 Price, 577.
(2) 5 Bligh, 339, at pp. 366, 367.
(3) 14 Sim. 244.
(4) 1 Dow. 235.
(5) 3 De G. M'N. & G. 982, at p. 988.
(6) 3 K. & J. 382.
(7) 1 H. L. C. 538.
(8) [1910] 1 K. B. 35.

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beyond the facts of that particular case. *Vandergucht* v. *De Blaquiere* (1) will also be relied on by the other side; but the precise point did not arise there, and the words of Lord Cottenham, at p. 244, were merely an interlocutory expression of opinion.

[They also contended that no notice in writing was served by the wife on the husband.]

Ronan, *K.C.*, and *J. C. Meredith*, for the respondent in *MacMahon* v. *MacMahon* (2) :—

It is settled law that an agreement entered into between a husband and wife making provision for the wife while living apart from the husband, is perfectly valid. Is it possible to contend that, if a man and his wife are unable to agree, the law will allow them to make an arrangement for a perpetual separation, but will not allow them to arrange to come together on terms? It is an abuse of language to call this a separation deed; the object of the deed was to end the separation, and it had that effect. The argument based on the alleged policy of the law accordingly fails. The Court should in any case be slow to decide the question upon the ground of public policy: see the judgment of Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines Limited* (3), and that of Lord Davey, at p. 500, where the latter Judge said, "Public policy is always an unsafe and treacherous ground for legal decision, and in the present case it would not be easy to say on which side the balance of convenience would incline." In *Vandergucht* v. *De Blaquiere* (4) Lord Cottenham referred to the difficulty of endeavouring to reconcile the different authorities on this subject, so that at that date, in 1839, there was no fixed rule as to what the policy of the law was, notwithstanding Lord Eldon's *dictum* in *Wellesley* v. *Wellesley* (5). Lord Cottenham, however, in *Vandergucht's Case* (1) was clearly of opinion that an agreement such as the present, being "the price and condition of terminating a state of separation," was valid. It is to be observed moreover that the policy of the law

(1) 5 Myl. & Cr. 229.
(2) Reported *ante*, p. 154.
(3) [1902] A. C. 484, at 491.
(4) 5 Myl. & Cr. 229, at 243.
(5) 5 Bligh, 339.

changes from time to time. In *Evanturel* v. *Evanturel* (1), Sir James W. Colvile said, "It was well observed during the argument that the determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time. Many transactions are upheld now by our own Courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which, for the time being, guide public opinion." There is nothing in respect of which there have been greater changes, both in the law and in the state of public opinion, than the status of a married woman. In Lord Eldon's time a married woman was the servant of her husband; he could give her "moderate correction," and "restrain her by domestic chastisement": see Christian's edition of Blackstone's Commentaries, at p. 444. Lord Eldon's own views as to the rights of a married woman are shown by his judgment in *Westmeath* v. *Westmeath* (2). Prior to the Married Women's Property Acts, a married woman could not during coverture acquire a legal right to personal property. Before the passing of the Matrimonial Causes Act 1884 (47 & 48 Vict. c. 68), an attachment would be issued against a wife who refused to obey a decree for restitution of conjugal rights: see *Weldon* v. *Weldon* (3). The modifications which the law as to separation agreements had undergone were referred to in 1888 by Lindley, L.J., in *M'Gregor* v. *M'Gregor* (4). It was there held that a separation agreement providing for payment of a weekly sum for the maintenance of the wife was binding; see also *Hunt* v. *Hunt* (5). *In Rodney* v. *Chambers* (6) a covenant by a husband to pay an annual sum by way of separate maintenance for his wife, in case of future separation, was held valid. In *Hope Johnstone* v. *Hope Johnstone* (7), where a wife was given an interest in settled property so long as she continued to be the cohabiting wife of the settlor, or his widow, on the determination of which trust the husband was to take an interest in the settled property, it was held that the restriction on the wife's interest was valid, Kekewich, J., being

(1) L. R. 6 Pr. Co. App. 1, at p. 29.
(2) Jacob, 126, at 137.
(3) 9 P. D. 52.
(4) 21 Q. B. D. 424, at 430.
(5) 4 D. F. & J. 221.
(6) 2 East, 283.
(7) [1904] 1 Ch. 470.

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of opinion that the provisions were intended, as are those in the present case, "rather to secure the continuance of cohabitation that to encourage a severance." See also *Marlborough* v. *Marlborough* (1). The suggestion that the reconciliation, when effected, put an end to the provisions of the deed is met by *Nicol* v. *Nicol* (2), where, at p. 529, Bowen, L.J., points out that the deed will only be put an end to "so far as the language of the deed, properly construed by the light of surrounding circumstances, shows that its provisions were only intended to take effect whilst the separation lasted." Here it is clear that the intention of the parties was that a reconciliation should take place, but that if the wife should subsequently be compelled again to part from her husband, she should be provided for. There is nothing in that contrary to law, or opposed to public policy concerning marriage.

White, in reply.

[In *Purser* v. *Purser* (3), *P. Lynch, K.C.*, *Norwood, K.C.*, and *Hungerford* appeared for the appellant, and *Sergeant Matheson, K.C.*, and *The Hon. C. Atkinson* for the respondents. The arguments were the same as before Ross, J., *ante*, p. 422.]

June 13.

Palles, C.B. :—

The principal question on the appeal in the first of these cases is, whether an annuity of £200 a year (reducible, in the events which have happened, to £100 a year), charged on certain lands in the county of Clare by a deed of 7th May, 1901, and thereby made payable to a trustee for the sole and separate use of the plaintiff, without power of anticipation, during the joint lives of herself and her husband, *if they shall so long live separate from each other*, and the plaintiff shall duly observe and keep the covenants on her part contained in the deed, and continue to lead a chaste and temperate life to the reasonable satisfaction of her husband, became payable to her by reason of a separation between her and her husband in the year 1911, they having cohabited together to that time from the execution of the deed—a period of ten years.

(1) [1901] 1 Ch. 165.
(2) 31 Ch. D. 524.
(3) Reported *ante*, p. 422.

At the time of the execution of the deed the husband and wife were living apart.

The deed recites that unhappy differences had arisen between the husband and the wife, and that "they were then living separately from each other, but are desirous of living together again, nevertheless with provision to meet the case of any future separation that may occur between them, and in order to effect such immediate reconciliation as aforesaid, it has been found necessary by them to enter into these presents, and it has been agreed between them that this deed shall not come into operation until such reconciliation as aforesaid has taken place." The deed then contains a covenant by the husband with the wife, and also a separate covenant by him with the trustee, that the wife shall, and may at all times hereafter, notwithstanding her coverture (after she shall have given written notice to her husband of such her desire), live separate and apart from her husband as if she were a *feme sole*, and shall thenceforth be free from his control and authority, and shall reside in such places and in such manner as she shall think fit, and that the defendant will not at any time thereafter institute any legal proceedings, or take any other steps to compel the plaintiff to live with him, and will not in any wise molest or interfere with her in her manner of living or otherwise.

Thus, the material matters appear to be—firstly, that the deed was entered into whilst the husband and wife were living separate and apart from each other; secondly, that it contemplated an immediate reconciliation, to effect which, it is clear from the long subsequent cohabitation, was not the apparent but the real and principal, as it was the immediate, object of the deed; but, thirdly, that the provision for the separate maintenance of the wife was to commence only upon her future separation from him at her own free election, whether with or without such cause as would entitle her to a decree for alimony from a matrimonial tribunal, or which at common law would justify her in separating herself from him.

The husband contends that a provision for separate maintenance under such circumstances is contrary to the policy of the law; and whether it is or is not, is the question for decision.

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The counsel on each side has presented the case as one of first impression, and no authority has been referred to, nor am I myself aware of any, identical in instance. It is necessary, however, in consequence of the divergence of opinion which formerly existed on cognate questions, that we should consider with some precision the state of the law on these questions, and, above all, have clearly before our minds the exact limits of the decisions of our supreme tribunal, the House of Lords, by which, of course, we are conclusively bound.

Firstly, then, we must treat it as settled that a contract between husband and wife, made *during cohabitation*, for a future as distinguished from an immediate separation, is void and inoperative, as being contrary to the policy of the law in relation to marriage. This was decided in 1819 in *Durant* v. *Titley* (1) by the Exchequer Chamber, reversing a previous judgment by the Exchequer. The arguments in it were heard by Lord Tenterden (then Lord Chief Justice) and Lord Chief Justice Dallas (then Chief of the Common Pleas). Their opinion was signified to the Lord Chancellor (Lord Eldon); but the judgment was that of the Court of Error, consisting, as I understand it, of those three learned personages. Although the case was elaborately argued, no reasons were given for the judgment—certainly none have been reported.

The question next came before the House of Lords in *The Marquess of Westmeath* v. *The Marquess of Salisbury* (2), upon an appeal from a decision of the Lord Chancellor of Ireland. In this appeal questions arose on the validity of two deeds—one of 1817, and the other of 1818. Upon the first of those deeds, the question decided in *Durant* v. *Titley* (1) arose. In the report in Bligh, three speeches of Lord Eldon are reported. The first of these was in or about June, 1829, and in it Lord Eldon uses the following words:—"Your Lordships will permit me here to notice that it is an agreed fact that when that instrument"—viz., the deed of 1817—"was executed, *there was no separation*, indeed, there could be no separation consistently with that deed, because it looks forward to the idea of a future separation, and *excludes the idea of a present separation*"; and he then uses words which not only did not

(1) 7 Price, 577. (2) 5 Bligh (N. S.), 339.

ultimately become part of the judgment of the House, but which would not have had any application to the case unless they were limited, as they do not appear to have been, to an agreement during cohabitation. "And I apprehend also . . . any instrument which provides for a present separation, and which prospectively looks to the parties living together again, and then to a future separation, that such a deed, so far as it provides for that future separation, will never be carried into effect." For this he gives as his reason "the coming together after the first separation being looked upon as what the civilians call a condonation, and that being held, in such case, to put an end to all separate provision, though that separate provision was to be enjoyed in a future separation according to the terms of the instrument itself that provided for the first separation." Later on, he proceeds to disparage, as in *St. John* v. *St. John* (1) he had previously disparaged, the decision in the King's Bench in *The King* v. *Mead*, (2) in which that Court held, on an application for a writ of *habeas corpus*, that an agreement between husband and wife to live apart was a formal renunciation by the husband of his marital right to seize her or force her back to live with him—a decision which is now settled law: *The Queen* v. *Jackson* (3).

Judgment was not pronounced when this speech was delivered, it being ordered on that occasion that the consideration of the case should stand over till next Session. The judgment of the House was ultimately delivered in 1830, the Lord Chancellor (Lord Lyndhurst) expressing the opinion that the deed of 1817 was contrary to the policy of the law, and could not be sustained. He says, at p. 393:—"Upon that point, I believe, no difference of opinion exists. It is a deed corresponding in its terms and provisions with the deed in the case, I think, of *Durant* v. *Titley* (4), which case has been over and over again recognized, and was recognized and confirmed by the decision of the Court of King's Bench in the recent case of *Hindley* v. *Westmeath* (5)." Lord Eldon said, at p. 400:—"With respect to the deed of 1817, it is

(1) 11 Ves. 525.
(2) 1 Burr. 542.
(3) [1891] 1 Q. B. 671.
(4) 7 Price, 577.
(5) 6 B. & C. 200.

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quite impossible, in my judgment, upon reading that, to sustain it for a moment; but it is unnecessary to consider that point, because as to that part of the decree there is no appeal on the part of Lady Westmeath." The *decision* then in *Westmeath* v. *Salisbury* (1) went no further than to affirm the doctrine laid down in *Durant* v. *Titley* (2).

We have also been referred to observations made by Lord Eldon in *Bateman* v. *The Countess of Rosse* (3) in reference to the effect of the renewal of cohabitation upon the provisions of a separation deed. He said:—"In regard to the point of reconciliation, notwithstanding what might be found in some of the reports, he held the general doctrine to be clear, that a reconciliation after a separation entirely did away with the effects of it. This rested upon the ground of public policy, as it must not be permitted to parties to make agreements for themselves, to hold good whenever they chose to live separate." These observations, however, were no part of the decision, which was that there had not been a return of cohabitation.

In *Hunt* v. *Hunt* (4), Lord Westbury, whilst describing the language of Lord Eldon as undoubtedly very unfavourable to separation deeds, adds:—"The decisions of Lord Eldon, save so far as he treated as null and void a provision for future separation, have not been correspondent with his language, for they" (*i.e.* his decisions) "have recognized the validity of these deeds. Neither was there any approval by the House of Lords of Lord Eldon's decision that the effect of reconciliation was to place the spouses in the exact position in which they were before marriage—an opinion contrary, I may observe, to the established doctrine that a matrimonial offence subsequent to condonation revives the condoned offences.

In result, then, I am of opinion that the only effect of the House of Lords' decisions is to establish that a contract made *during cohabitation* which provides for future separation is contrary to the policy of the law, and therefore void.

The question in the present case, viz., whether an agreement between husband and wife, who were then living separate and

(1) 5 Bligh (N. S.), 339.
(2) 7 Price, 577.
(3) 1 Dow. 235.
(4) 4 De. G. F. & J. 221, at 228.

apart, providing for their living together again, with a provision for her to take effect only *in the event of a future separation*, was legal and enforceable, appears to have been raised for the first time in *Vandergucht* v. *De Blaquiere* (1), upon an interlocutory motion for an injunction, before Lord Cottenham. He reserved it for the hearing, stating his reason for so doing in the following words :—

"But it was argued that the agreement was illegal, as providing for a future separation. If it were necessary to decide that point, the difficulty of endeavouring to reconcile the different authorities upon that subject, and to extract a sound rule from them all, would be to be encountered. In *Rodney* v. *Chambers* (2), a covenant providing a separate maintenance for the wife, in the event of a future separation, was held good. In *Durant* v. *Titley* (3), it was held good in the Court of Exchequer, and bad in the Exchequer Chamber by Lord Tenterden and Lord Chief Justice Dallas; but in *Jee* v. *Thurlow* (4) Lord Tenterden says that the Judges who decided *Durant* v. *Titley* (3) did not intend to shake any former decision; and in *Westmeath* v. *Salisbury* (5) the Court of Chancery in Ireland having held such a provision illegal, and an appeal having been brought before the House of Lords upon other grounds, so that this question was not before the House for decision, Lords Eldon and Lyndhurst expressed very decided opinions against the legality of such provisions for future separation. There are, no doubt, shades of distinction between the circumstances of those cases, and some facts in this case which differ from them all, and particularly in this—that the agreement, providing for the event of a future separation, was *not entered into when the parties were living together, but was the price and condition of terminating a state of separation.* There are many other cases applicable to this subject; but those I have referred to are sufficient to show, if the question of the legality of the agreement were to be decided between these parties, that the

(1) 5 M. & C. 229.
(2) 2 East, 283.
(3) 7 Price, 577.
(4) 2 B. & C. 547.
(5) 5 Bligh (N. S.), 339, see 366.

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question is of too much importance to be disposed of upon an interlocutory application. It could only be properly decided at the hearing."

As to the apparent discrepancy adverted to by Lord Cottenham between *Rodney* v. *Chambers* (1) and *Durant* v. *Titley* (2), and the inconsistency between the decision in the latter case and the observation of Lord Tenterden in *Jee* v. *Thurlow* (3), it is right to say that Lord Cottenham was in error. There was a clear distinction between the facts of the two cases—a distinction, too, which shows the accuracy of the remark of Lord Tenterden in *Jee* v. *Thurlow* (3). In *Rodney* v. *Chambers* (1), the future separation was to be with the consent of the trustees, who were to decide whether sufficient cause for separation did or did not exist. In *Durant* v. *Titley* (2) there was no such restriction; the separation might be, as it may be here, at the mere will of the wife. In the subsequent case of *Chambers* v. *Caulfield* (4) (which was decided after *Durant* v. *Titley* (2), but to which Lord Cottenham's attention was not directed) Mr. Justice Lawrence refers to this distinction, saying: "We thought that there was nothing illegal in the parties agreeing to refer the question what was a good cause of separation to a domestic forum instead of applying to the Ecclesiastical Court for a divorce and alimony." In *Jee* v. *Thurlow* (3) also, the distinction is pointed out by Bayley, J. I mention this as I desire to dissociate myself from the opinion that *Rodney* v. *Chambers* (1) has been overruled, or that it has been wrongly decided. It appears from a note in the report of *Vanderguchi* v. *De Blaquiere* (5) that the case was compromised; and therefore Lord Cottenham had not an opportunity in that case of deciding the question.

Before proceeding now to refer to a few of the cases which ultimately established, contrary to the view of Lord Eldon, the validity and enforceability of separation deeds, it is right to direct attention to the *fons et origo* of the discordant decisions:—

In delivering judgment in *Hunt* v. *Hunt* (6), Lord Westbury, Lord Chancellor, says: "Before the Reformation, as we all know,

(1) 2 East, 283.
(2) 7 Price, 577.
(3) 2 B. & C. 547.
(4) 6 East, at p. 252.
(5) 5 Myl. & Cr. 229.
(6) 4 De G. F. & J. 221, at 226.

marriage was regarded by the Church, and therefore regarded by the law, as a sacrament. It was a contract of the highest possible religious obligation. All its duties and the obligations which it created were matters of ecclesiastical cognizance, and, above all, it is to be recollected, if I am not mistaken, that the duty of cohabitation—the primary duty arising from the contract—was enforced by the spiritual tribunal, by spiritual punishments, acting as they did *pro salute animae*. It was, therefore, quite correct to say anterior to the Reformation, in speaking of the policy of the law, that voluntary separations were forbidden by law, and that contracts made for giving effect to voluntary separations were therefore invalid, as being contrary to the policy—that is, contrary to the prohibition—of the law. But then came the Reformation and the statute of Henry VIII, which, providing for that which unhappily never took place, the revision of the common law, enacted that the rules of the ecclesiastical law should prevail, as far as they were not contrary to the common law. The ecclesiastical law and the rules and doctrines of the Courts christian were therefore subordinated to the common law, and what the common law did not prohibit in the ordinary relations of life could no longer be dealt with as an offence by the ecclesiastical law. As expressed by one of our older writers, the ecclesiastical law was thenceforth put *sub graviore lege*. Then, by the common law, voluntary separations, that is, the cessation by mutual agreement of the *consortium vitae* of matrimony, was not a thing forbidden, prohibited, or in any manner made the subject of punishment. It seems to me, therefore, impossible to say after the Reformation, *as a general proposition*, that voluntary separations were contrary to the policy of the law. It certainly was perfectly true that inasmuch as the whole jurisdiction on the subject of marriage remained vested in the Courts christian, and the power of instituting suits for the restitution of conjugal rights was retained by those Courts, and inasmuch as those Courts would not permit a contract of voluntary separation to be pleaded in bar of the right to interfere, as they refused to countenance any separation that had not been pronounced by the authority of a spiritual Court, it was perfectly true to say that deeds of separation remained forbidden, that is, were treated as of no avail by the

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ecclesiastical law . . . But there being nothing to prohibit deeds of separation in the common law at a very early period (how early it is now impossible to ascertain) . . . deeds of separation with the covenants contained therein were recognized and treated as contracts capable of being enforced at common law."

Thus, we had two jurisdictions, each acting on a different principle. Courts of Common Law, speaking generally, viewed contracts for immediate separation as legal. The Ecclesiastical Courts held any agreement for a separation, either immediate or future, any separation other than an immediate one under their own decree, illegal. To use the words of Sir W. Scott in *Mortimer* v. *Mortimer* (1): "This Court (that is the Ecclesiastical Court) considers a private separation as an illegal contract, implying a renunciation of stipulated duties, a dereliction from those mutual offices which the parties are not at liberty to desert, an assumption of a false character in both parties contrary to the real *status personae*, and to the obligations which both of them have contracted in the sight of God and man, to live together 'till death do them part,' and on which the solemnities both of civil society and of religion have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient, and sufficiently proved. These Courts, therefore, to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract have uniformly rejected such covenants as insignificant in a plea of bar, and leave it to other Courts to enforce them so far as they think proper upon a more favourable view, if they entertain it, of their consistency with the principles of the matrimonial contract."

These two lines of inconsistent decisions at length came before the House of Lords in *Wilson* v. *Wilson* (2), when Lord Cottenham was Chancellor, one of the questions there being, whether a Court of Equity ought to entertain jurisdiction for performance of articles of separation: and that question was decided in the affirmative, so far as the arrangement of the property agreed on.

Later on this case came again before the House of Lords,

(1) 2 Hagg. Consist. Rep. 310. (2) 1 H. L. C. 538.

upon a question arising on the frame of the deed to carry out the articles of separation. It was heard before the then Lord Chancellor (Lord Cranworth), Lord Brougham, and Lord St. Leonards. Of these three learned personages, one, Lord Brougham, expressed his opinion against the soundness of the decision of the House. "I also lament," he says, "that I had not the fortune to be present when this case was decided on the last occasion in this House in the year 1848. I had heard a considerable part of the argument; and I certainly should not have been prepared, as then advised, and I will add, even as at present advised, to concur in that judgment of affirmance." But I need not say that his disapproval was powerless to affect the decision.

Specific performance of a contract for separation being thus held enforceable, so far as it regarded the property agreed to be settled, the further question arose in *Hunt* v. *Hunt* (1), whether the covenant, usual in those deeds, that the husband should permit the wife to live separate and apart, and that he would not take proceedings for restitution of conjugal rights, would be specifically enforced by injunction. The Lord Chancellor (Lord Westbury) decided this question in the affirmative. "The long series of eminent Judges," he says, "whose observations preceded the determination of the House of Lords," in *Wilson* v. *Wilson* (2), "are not to be weighed in the balance against the authority of that judgment; and if they are overborne or overruled by that judgment, they can no longer be cited with propriety to induce the Court to refuse to give effect to the clear principle and determination involved in that judgment; but I see in it no departure from principle, voluntary separation being no offence by the common law, however it may be regarded in a religious point of view. If it is not to be regarded as a civil offence against society, then the power to institute a suit for the restitution of conjugal rights is nothing in the world more than a private remedy and a private right belonging to the husband. The general maxim applies, 'Quilibet potest renunciare juri pro se introducto.' I beg attention to the words, 'pro se,' because

(1) 4 De G. F & J. 221. (2) 1 H. L. C. 538.

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they have been introduced into the maxim to show that no man can renounce a right of which his duty to the public and the claims of society forbid the renunciation. But if this voluntary separation is a state of things which by the consent of the parties may be created, and created without offence, then it falls within the scope and ambit of the ordinary power of contracting, and there can be no difficulty upon principle or upon the ground of the policy of the law as to the validity of such a contract. These *a priori* reasonings are, however, altogether removed by authoritative decision, for if it be ever possible to find a judgment directly and conclusively upon the very subject before the Court, none could be found more conclusive or more cogent than the series of determinations arrived at by the House of Lords. And notwithstanding the fact that some of the noble and learned Lords who concurred in them declined at the moment to recognize the conclusion which they involve, yet it is impossible to circumscribe that judgment by any of the words used in the speeches of the learned and noble lords who addressed the House. That judgment remains a binding law upon all tribunals; they are bound to carry it to its legitimate consequences and effects; and upon its authority I at present feel myself compelled to give effect to this covenant."

I conclude this reference to authorities by mentioning that in *Besant* v. *Wood* (1), a case conversant with an agreement for an immediate separation, Sir George Jessel extended the application of *Hunt* v. *Hunt* (2) by granting the injunction against the wife, as Lord Westbury had against the husband. The effect of the Judicature Act was to merge into the High Court both of the jurisdictions I have referred to; and since the decision of Sir J. Hannen in *Marshall* v. *Marshall* (3), a valid deed of separation is held available as a plea in bar in an action for restitution of conjugal rights.

This language of Lord Westbury is an authority that such contracts as those in *Wilson* v. *Wilson* (4), and *Hunt* v. *Hunt* (2), *i.e.* contracts for immediate separation, are not against the

(1) 12 Ch. D. 605.
(2) 4 De G. F. & J. 221.
(3) 5 Prob. Div. 21.
(4) 1 H. L. C. 538.

policy of the law; and that the reason of that decision is that the rights of the spouses in respect to cohabitation have since the Reformation been no more than private rights which the spouses can validly renounce. This doctrine, however, cannot be applied to contracts for future separation made during cohabitation, because the House of Lords has decided that such contracts are contrary to the policy of the law; and I confess I have a difficulty in applying it to any contract not of the nature of that before the Lord Chancellor in that case. In fact, I am of opinion that this is the legal limit of its effect as an authority, and that if we extend it beyond that limit, the extension must rest solely upon our, and not upon his, authority. At present I am not prepared to adopt his reasons, or to extend the decision itself, as I agree with the view of Knight-Bruce, L.J., in *Cartwright* v. *Cartwright* (1), that society has an interest in the performance of duties arising out of contracts of this nature, so that the rights under such contracts cannot be strictly called private rights. As, however, there is another matter arising from recent legislation to which I proceed to refer, it is not necessary absolutely to determine whether the doctrine of Lord Westbury should be extended I refer to one of the statutes mentioned during the argument. The 47 & 48 Vict. c. 68, s. 2, directs that, thereafter, a decree for restitution of conjugal rights shall not be enforced by attachment. This is a declaration that if one spouse, against the will of the other, and without just cause, departs from cohabitation, the remedy is no longer, as in furtherance of the view of the Ecclesiastical Courts it formerly was, compulsion to return to cohabitation, by imprisonment until the decree is complied with. The substituted penalties are—(1) money liabilities; or (2) it may be relied on, not in furtherance of the matrimonial obligation, but as a step towards the dissolution of the marriage relation, by divorce or judicial separation. It appears to me to amount to a declaration that it is no longer to be deemed the policy of the law that unwilling spouses should be compelled to cohabit together, even where there is no valid ground for separation. How, then, can it be the policy of the law that spouses cannot be free to contract that they will not cohabit?

(1) 3 De G. M. & G. 982.

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Coming to the facts of this particular case. Can we say that the necessary tendency of the contract here, which, in fact, caused cohabitation for ten years, was to induce separation? At the time of the contract the parties were living apart. Their primary object was reconciliation, not separation. Assuming, as has been decided, that in a marriage contract future separation is not to be anticipated or provided for—but when separation has actually taken place, is the possibility of its recurrence to be ignored? Common experience, and the sense of mankind, show that it cannot be. When matrimonial offences have been committed, and condoned by subsequent cohabitation, the condoned offences are revived on the occurrence of a fresh matrimonial offence. Thus parties reconciled after separation are not in the same relative position as when they started at marriage. Taking human nature as it is, it seems to me to be reasonable in a case such as the present to foresee the possible recurrence of the cause, whatever it may have been, of the former separation, and to provide in reference to it, and that it is not *contra bonos mores*, nor contrary to any policy of the law, that a husband whose wife is returning to cohabitation after a separation should trust her by whose voluntary act the cohabitation is renewed to be the sole judge of the circumstances which should render it advisable that such cohabitation should cease. In my opinion, it is rather of the highest policy of the law that in such a case the parties shall be absolutely unfettered in their freedom of contract. The less fettered they are, the more likely will they be to arrive at an agreement; and arrival at an agreement for a reconciliation is a matter which the law ought to encourage. I agree with the Master of the Rolls that a contract such as we have here, which affords a possibility of the parties living together again, tends more to reconciliation and future cohabitation (which is the immediate, the certain, and the primary object of the agreement) than to future separation, which is remote and contingent. If the contingency does not happen, a meritorious result has been attained. If, unfortunately, the contingency takes place, as here the parties are in a position which the law cannot regard as worse, or more against its policy, than the position they were in immediately before the contract. In each, their position is that of separated spouses.

Upon the whole, then, I have arrived at the clear conclusion that, as the law now stands, there is nothing in its policy which renders illegal a contract between husband and wife for reconciliation, although it contains a provision, such as we have here, entitling the wife to separate maintenance in the event of a future separation, although dependent solely on her own will.

Upon the technical point relied on, the absence of written notice, I am of opinion that the letter of 3rd November, 1911, was sufficient.

In my opinion, therefore, the judgment of the Master of the Rolls was in all respects correct, and ought to be affirmed, and the appeal ought to be dismissed with costs.

In the second case, *Purser* v. *Purser* (1), the only question argued was as to the validity of a contract made when the parties were living separate, and as a compromise of a divorce suit which contained a provision for separate maintenance of the wife in the event of a future separation; that is the question I have just considered at length. Mr. Justice Ross determined that the contract was valid. In that conclusion, for the reasons already given in my judgment in *MacMahon* v. *MacMahon* (2), I entirely concur. The judgment in that second case will therefore be affirmed, and the appeal in it will be dismissed with costs.

HOLMES, L.J.:—

By a strange coincidence these cases, which were heard in immediate succession in this Court, involve an interesting question of law between husband and wife, which, although often referred to by Judges and text-writers, has never been the subject of express decision.

It will be best understood by a statement of the facts of *MacMahon* v. *MacMahon* (2). The parties were married in the year 1884. They lived together as husband and wife until 1900, and had six children, of whom four are now of age. In that year they separated in consequence of unhappy differences, and while they were living apart they executed an indenture, dated the 7th May, 1901, which has given rise to these proceedings.

(1) Reported *ante*, p. 422. (2) Reported *ante*, p. 154.

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There is no doubt that this deed was made in contemplation of a reconciliation; and it recited that it had been agreed between the husband and wife that it should not come into operation until such reconciliation had taken place. It provided that, in consideration of the covenants therein contained of the husband, the wife might at all times thereafter, notwithstanding her coverture (after she should have given written notice to her husband), live separate and apart from him as if she were a *feme sole*. It then contains a covenant that so long as they should live separate from each other, and the wife should observe and keep the covenants on her part therein contained, and her life be chaste and temperate, the husband would pay her an annual sum by two equal half-yearly payments, which sum was charged upon certain lands. The deed contained provisions reducing the annuity in certain circumstances, and for the maintenance of and otherwise in relation to the children, to which it is not necessary to refer. I may say, however, that while the wife is given liberty to separate from her husband at any time she may wish to do so, the benefits which she will then become entitled to receive from him are made subject to fair and reasonable conditions not only in her own interest but in that of himself and the family. The deed succeeded in its object. Cohabitation was resumed and continued for about ten years, when differences again arose, and the wife, having left his house in June, 1911, has since lived apart. The husband having refused to pay the annuity stipulated for in the deed on the ground that the contract which it purported to embody was illegal and void, the originating summons now under consideration was served for the purpose of having this question decided. I have already said that it has not been hitherto finally determined, but two kindred propositions have been settled by authority binding on this Court, and must, I think, be regarded as part of the Common Law, unless and until they are altered by legislation. The first of them is that an agreement in an ante-nuptial settlement, or entered into by the married pair while living together after marriage, by which the husband makes provision for the wife in the event of their ceasing to cohabit, is void by reason of its being opposed to public policy. The unity of the family is so closely connected with the prosperity of the State as to account for the objection entertained

by the expounders of our unwritten law to a contract which might induce a wife to separate from her husband without good reason.

In the course of time, however, the views of Judges as to what is required by public policy on this subject seem to have undergone modification, for it has been well settled for over sixty years that although a deed providing for a contingent or future separation of the parties at the will of either, and not intended to take immediate effect, is void, a deed executed after they have separated, or in contemplation of an immediate separation, and containing a covenant by the husband to provide the wife with an annuity while they lived apart, is valid. I do not propose to consider the authorities that establish these propositions, or to reconcile the one with the other. If the prospect of an annuity might tempt the wife to leave the husband, an annuity which she was actually receiving after separation might be an inducement to remain away. It is enough for me to say that I feel myself obliged to accept them as law in this Court, and to say that in my opinion the case under consideration does not come within either.

Here the separation had taken place, and continued for a considerable time. The object of the deed was to bring about a reconciliation, and it was only to become operative if and when such reconciliation took place. The result was what the parties contemplated. So far from endangering the unity of the family, it restored it, and they lived together for many years. To hold that a contract which was intended to bring, and which brought, this about, was opposed to public policy, would seem grotesque to my mind. I should take the liberty of saying so, even if judicial opinion to the contrary was much stronger than it is. I find, however, that the *obiter dictum* of Lord Cottenham, which has been quoted by both the Master of the Rolls and Ross, J., has met approval from other Judges, although text-writers have not supported it. It is enough for me that I am not bound by any decision, and that I am at liberty to act on my own conception of public policy by holding the deed valid. It has been argued that the annuity is not payable, inasmuch as notice in writing was not served on the husband before the separation pursuant to the words

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of the deed. While the separation continued, however, a letter of the 3rd November, 1911, was written by the wife to the husband, which I am of opinion was sufficient notice to make the annuity payable as from that date. This was the view of the Master of the Rolls; and agreeing with him on both points, I hold that the appeal must be dismissed.

The essential facts in *Purser* v. *Purser* (1) only differ from those in *MacMahon* v. *MacMahon* (1) in that they are much more unfavourable to the defendant. The parties were married in 1898 and they had one child born in 1904. The husband was guilty of cruelty to his wife, and in 1906 she obtained from the justices of Middlesex a protection order under which she became entitled to the custody of the child and to a weekly sum of £2.

Cohabitation was subsequently resumed, but the husband's cruelty continued until 1910, when the wife filed a petition in this country for a divorce *a mensa et thoro*. When this cause came on for hearing, a consent was entered into upon terms which are embodied in a post-nuptial settlement which is the foundation of this action. By this deed the husband put in settlement the sum of £2500, the first trust of which was for himself for life, and, after declaring the subsequent trusts thereof, it is provided that in the event of future disagreements the wife should be at liberty to live apart, and from the date of such separation the husband would pay her weekly £1 10*s*., which sum was charged upon the income of the trust fund. Cohabitation was resumed after the consent, but, in consequence of renewed cruelty, the wife left him again. After this separation the deed was executed, and for a short time the weekly payment of £1 10*s*. was made. It was then stopped by the husband on the ground that the contract to provide it was contrary to public policy. Hence the present action to enforce it, upon which my only comment is that I cannot imagine a judicial act more repugnant to public policy than to reverse the judgment appealed from, and to dismiss the plaintiff's action.

Cherry, L.J., concurred.

R. ST. J. C.

(1) Reported *ante*, p. 422. (2) Reported *ante*, p. 154.

IN THE MATTER OF THE ESTATE OF JOHN S. ARMSTRONG.

Wylie, J.
1913.
June 10, 16

Land Purchase Acts—Impropriate tithe rentcharge subject to a rent or annual sum—Redemption-price of apportioned part of tithe, exceeding £30 and under £100—Irish Land Act, 1903 (3 Edw. 7, c. 37), section 63, sub-section 2—Application of—Costs.

Where impropriate tithes, payable out of lands sold under the Land Purchase Acts and other lands, are subject to a rent, and the redemption-price of the apportioned part of the tithes, payable out of the lands so sold, exceeds £30, but does not exceed £100, the vendor, notwithstanding the fact that he has notice of the existence of the rent, has a *prima facie* right to have such redemption-price paid out to the person in possession or in receipt of the income of the tithes, pursuant to the provisions of section 63, sub-sect. 2, of the Irish Land Act, 1903 (1), and to be freed from all costs incidental to the payment out thereof, except such costs as are properly payable in respect of the affidavit and undertaking required for such payment out.

QUESTION OF LAW arising on the ruling of the Final Schedule. The facts on which the question arose, as stated in the judgment of Wylie, J., were as follows:—

At item No. 3 on the Final Schedule there was set out a claim by Mrs. Mitchell and Mr. Stanley in respect of an impropriate tithe rentcharge of £2 17*s.* per annum, payable out of the lands sold in this matter. This sum of £2 17*s.* was the portion of the rectorial tithes of the Parish of Fuertz, which had always been paid by these lands. The rest of the tithes of the said Parish

(1) Section 63, sub-sect. 2, of the Irish Land Act, 1903, is as follows:—If the redemption-price [i.e. of any superior interest, or an apportioned part thereof, redeemed under the Land Purchase Acts] exceeds £30, but does not exceed £100, it may be paid to the person in possession or in receipt of the income of the superior interest, or to trustees to be appointed or approved by the Land Commission, or the Land Judge, as the case may be, upon the undertaking in the prescribed manner of such person, or of such trustees, to apply the redemption-price as if it were capital money, arising under the Settled Land Acts, 1882 to 1890.

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had been paid by twelve other owners of land in the Parish in various sums proportional to the extent of their estates. The entire of the said rectorial tithes were held by the claimants under a lease or grant for ever from the Earl of Essex, subject to the payment of a perpetual rent or annual sum of £34 12*s.* 2*d.*

Eight of the said other twelve owners had already sold their estates under the Land Purchase Acts, and the several portions of the said tithes respectively payable by them had been redeemed, and the redemption-prices thereof distributed. In seven of the eight cases the redemption-price exceeded £100, and in one case it was between £30 and £100, but in all of the said cases, in distributing the redemption-price, the said rent or annual sum payable to the Earl of Essex was apportioned, and the apportioned parts redeemed out of the several redemption-prices of the tithe. By this means the unredeemed portion of the said sum of £34 12*s.* 2*d.* amounted only to £6 3*s.* 6*d.*, which sum was now payable out of the tithes redeemed in this matter and the tithes payable by the other four owners, who had not yet sold, and who paid sums varying from £1 14*s.* 4*d.* to £3 12*s.* 9*d.*

The redemption-price of the £2 17*s.*, payable out of the lands sold in this matter, was £67 5*s.* 2*d.*, and it was plain that the redemption-prices of the sums payable by the other four owners when redeemed would exceed £30 and be less than £100.

The question now arose as to whether, under the circumstances, the provisions of section 63 (2) of the Irish Land Act, 1903, were applicable.

Arthur Meredith, *K.C.*, for the owner of the rent :—

Section 63 (2) of the Irish Land Act, 1903, has no application to this case. This appears—(*a*) from the words of the sub-section, and (*b*) from the analogous provisions in section 71 of the Lands Clauses Act, 1845, whence section 63 is taken. Section 63 (2) shows that the redemption-price is to be dealt with as capital moneys, that is, it presupposes that such moneys are the absolute property of the settlement, and not subject to superior interests or incumbrances having priority to the settlement. The trustees of the settlement are not trustees for the purposes of superior interests

or of incumbrances having priority to the settlement. The analogous provisions in the Lands Clauses Act, 1845, only relate to moneys which would be capital moneys in the hands of the trustees of the settlement, that is, moneys not subject to superior interests or incumbrances having priority to the settlement. As to the question of whether the rent is a superior interest, whether it is so technically or not is immaterial. It is a claim which is transferred to the purchase-money under section 16 of the Act of 1903.

D. G. Chaytor, K.C., for the vendor :—

This tithe rentcharge is clearly a superior interest. The redemption-price comes within the limits mentioned in section 63 (2) of the Irish Land Act, 1903, and the vendor is entitled to the benefit of the provisions of the sub-section, the object of which was to avoid the delay that would arise if it were necessary to show title to so small a sum, and further to relieve the purchase-money of the costs incidental to showing title. The fact that the vendor has notice of the existence of the rent payable out of the tithes is immaterial. This rent is not a superior interest affecting the lands. The only costs which the vendor should pay are the costs properly payable in respect of the affidavit and undertaking necessary for the payment out of the redemption-price of the tithes.

WYLIE, J. :— June 16.

[After stating the facts as above set out, his Lordship continued :—]

Now in this state of facts the owner of the rent payable out of the tithes has raised a nice question as to the meaning and application of section 63 (2) of the Irish Land Act of 1903. That sub-section provides that where any superior interest, or an apportioned part thereof, is redeemed under the Land Purchase Acts, if the redemption-price exceeds £30, but does not exceed £100, it may be paid to the person in possession or in receipt of the income of the superior interest, or to trustees to be appointed or approved by the Land Commission, upon the undertaking in the prescribed manner of such person, or of such trustees, to apply the redemption-price as if it were capital money arising under the Settled Land Acts.

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Accordingly, the vendor contends that, as the redemption price of the tithe rentcharge, which is undoubtedly a superior interest, is, in this case, over £30 and less than £100, it ought to be paid to the claimants, who are the persons in possession or in receipt of the income of the superior interest, upon their giving the prescribed undertaking, without calling on them to prove title thereto, other than such possession or receipt. The vendor's reason for so contending is, in the first place, to prevent the distribution of the purchase-money being delayed by proof of title to such small sums, and, in the second place, to prevent the purchase-money being burdened with the costs of proving such title. That, no doubt, was the object of the sub-section. But this claim of the vendor is contested by the owner of the rent, issuing out of the tithes on two grounds: First, that this case does not come within the sub-section, and secondly, that, if the redemption-prices of these tithes were paid to the persons in receipt of the tithe, there would be no security for the payment of the rent issuing out of the tithe except the personal security of the persons to whom the redemption-price is paid.

Now, as to the first ground:—Does the case come within the sub-section? It is not questioned that these tithes are a superior interest, and that an apportioned part thereof has been properly redeemed at a price exceeding £30 and not exceeding £100; and, therefore, by the express words of the sub-section, the redemption-price may be paid to the persons in receipt of the income of the tithe upon the prescribed undertaking, and the only evidence required to obtain payment is an affidavit by the claimants that they are in possession or receipt of the income, and stating whether the payment is to be made to them or to trustees, and exhibiting the undertaking: See Maxwell's Irish Land Acts, 1903 to 1909, p. 1388 *b*. No other evidence of title is required, nor is any inquiry necessary as to whether the superior interest is charged or incumbered. Therefore, in most cases neither the vendor, the Examiner, nor the Court would have any notice of any such charge or incumbrance, and, in such cases, the redemption-price would be paid out without regard to any outgoings, the obligation to discharge such (if any) being thrown upon the persons to whom payment is made.

But in this case the vendor, the Examiner, and the Court have notice that a rent or annual sum is payable out of the tithes by the owner thereof, and the contention is, as I understand it, that if these tithes were settled, and the tenant for life were to sell them under the Settled Land Acts, the capital money arising from such sale could not be applied in redeeming or discharging the rent issuing thereout, because, the rent being paramount to the settlement, the sale would be made subject to the rent, and that, therefore, section 63 (2) cannot be applied. But this is not a case of a tenant for life of tithes selling them as subsisting tithes. The tithes, being a superior interest, are compulsorily redeemed and extinguished under statutory power, and a redemption-price in cash is substituted therefor. The sub-section does not say that the redemption-prices, to which it applies, *are* capital money arising under the Settled Land Acts, but that such prices are to be paid and applied *as if they were* such capital moneys.

Now, how are such capital moneys applied? In the first place, in paying all charges upon the settled land that are paramount to the settlement, where the sale is made free from such charges. Now, this rent, as it is called, issuing out of the tithes, is not a "superior interest" affecting the lands, but merely a charge or incumbrance on the tithes: see *Re Esdaile* (1); and may be paid or discharged out of capital money arising from the sale of the tithes: see *Chaytor's Settled Estate* (2), and *In re Norton and Las Casas' Contracts* (3).

It seems to me, therefore, that section 63 (2) clearly applies to this case, and that the vendor, notwithstanding notice of the charge, has a *prima facie* right to have the redemption-price of the tithes paid under the sub-section, and to be freed from all costs incidental to the payment or distribution thereof, except such costs as are properly payable in respect of the affidavit and undertaking required for such payment out.

The second ground of objection to the payment of the redemption-price of the tithes to the claimants at No. 3 on the schedule seems to me to arise only as between the claimants and

(1) 54 L. T. (N. S.) 637.
(2) 25 Ch. D. 654.
(3) [1909] 2 Ch. 59.

Wylie, J. 1913.

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the owner of rent payable by claimants out of the tithe. If the redemption-price were paid to the claimants on their prescribed undertaking, they would be liable of course to pay the rent if not redeemed out of the income of the redemption-price. But the owner of the rent is not satisfied with the personal security of the claimants, and objects to such payment. It appears to me that, apart altogether from the question of the solvency of the claimants, there is good ground for that objection, and that it would be unfair and inequitable, under the circumstances of this case, so to pay out the fund. If the parties do not arrange the matter themselves, there are, I think, two courses open to me. I could under section 20 of the Act of 1891 either (1) retain and invest the redemption-price and pay the income or part of it to the owner of the rent; or (2) apportion and redeem an apportioned part of the rent, and pay the redemption-price out of the redemption-price of the tithes; but, as I understand the parties have already entered into a consent to distribute the redemption-price according to the latter alternative, there can be no difficulty in carrying this out.

The question, however, that has given rise to all this contention still remains, viz.:—Who is to pay the costs of the distribution according to the method so agreed upon between the owner of the tithes and the owner of the rent, and the further costs of the argument? For the reasons I have already given, I think the only costs the vendor should be obliged to pay are the costs of the owners of the tithe incidental to its redemption and the payment to them of the redemption-price under section 63 (2), and as I think that the vendor's contention that the sub-section applies to the case, so far as he is concerned, is right, and, as the argument took place on the ruling of the final schedule, I think that each party should abide his own costs of the argument.

Solicitors for the Earl of Essex: *Baker, Ringwood, & Gordon.*
Solicitors for the vendor: *Montgomery & Chaytor.*

J. E. W.

ATTORNEY-GENERAL AND COMMISSIONERS OF PUBLIC WORKS IN IRELAND *v.* HOWLEY.

(1912. No. 355.)

M. R.
1913.
May 15, 16.
June 25.

Commissioners of Public Works—Loan to occupier—Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), section 31 (2)—Landed Property Improvement (Ireland) Act, 1847 (10 & 11 Vict. c. 32)—Servants of the Crown—Crown debt—Statute of Limitations.

A loan made to an occupier of land by the Commissioners of Public Works acting in execution of the Land Law (Ireland) Act, 1881, section 31 (2), and the provisions of the Landed Property Improvement (Ireland) Acts, made applicable thereto by Treasury Minute, is not a Crown debt, and may be barred by lapse of time by the Statute of Limitations.

TRIAL OF ACTION.

This action was brought by the Commissioners of Public Works in Ireland against Thomas Howley, to enforce payment against the lands in his occupation of a loan made in the year 1884 to the former occupier, Michael Loftus, and charged upon the lands by deed.

The following is a copy of the deed :—

"This indenture, made the 3rd day of January, 1884, between Michael Loftus, of Curry, in the county of Sligo, tenant farmer, hereinafter called 'the said tenant' of the one part, and the Commissioners of Public Works in Ireland, incorporated by the statute 10 & 11 Vict. c. 32, and acting in execution of the Land Law (Ireland) Act, 1881, and of the Landed Property Improvement (Ireland) Acts, as defined by the said Land Law (Ireland) Act, 1881, hereinafter called 'the said Commissioners' of the other part. Whereas the said tenant is occupier of the lands hereinafter mentioned under a letting from year to year by Colonel Richard Phibbs at the yearly rent of £25 10*s.* 6*d.*, payable on the 1st day of May and the 1st day of November in every year. And whereas the said tenant hath made application to the said Commissioners, under the 31st section of the Land Law

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(Ireland) Act, 1881, to lend him the sum of £245, to be advanced by instalments, in accordance with the provisions of the Landed Property Improvement (Ireland) Acts, so far as the Treasury have declared the same to be applicable, and also in accordance with the regulations of the Commissioners, to be expended in the works hereinafter mentioned, that is to say, drainage, fencing, reclamation, and erecting farm offices on the said lands, and in defraying the costs and expenses incurred by the said Commissioners in relation to the loan, and to be repaid with interest as hereinafter mentioned, and the Commissioners have agreed to make such loan. Now, this indenture witnesseth that, in pursuance of the said agreement, and in consideration of the sum of £245 to be lent as aforesaid, the said tenant doth hereby charge that part of the lands of Curry in his occupation, situate in the Barony of Leyny in the county of Sligo, and all his tenancy, estate, and interest therein, with the payment to the said Commissioners or their assigns of all advances from time to time made to him by the said Commissioners in pursuance of the said agreement, with interest on such advances, at the rate of £3 10*s.* per cent. per annum. Provided always that if the said tenant, his executors, administrators, or assigns, shall pay to the said Commissioners or their assigns, during a period of twenty-two years an annuity of £6 10*s.* in respect of every instalment of £100 advanced, and so in proportion for every lesser sum, by equal half-yearly payments, on the 5th day of April and the 10th day of October in every year, the first of such payments in respect of each instalment to be made on the second of the said gale days after the advance of the instalment, together also with interest at the rate aforesaid on each instalment advanced, from the date of the advance to the first gale day after the advance, and shall observe the covenants contained in this indenture, then the said Commissioners or their assigns shall not call in the said loan or such part thereof as shall for the time being remain unpaid; and if the said tenant discharges the said loan in manner aforesaid, then the said Commissioners or their assigns will release the said tenant, his executors, administrators, or assigns, and the said lands, and his tenancy, estate, and interest therein, from the sums so advanced and the interest thereon and all powers and remedies for the

recovery of the same, provided always that if the said tenant, his executors, administrators, or assigns, shall make default in payment of any such half-yearly payment as aforesaid for the space of six calendar months next after the day so appointed for the payment of the same, then all the advances made by the Commissioners on the security of this indenture with interest thereon, so far as such advances and interest are then unpaid, shall forthwith become payable by the said tenant, his executors, administrators, or assigns, to the Commissioners or their assigns, as a present debt, the amount whereof, in addition to all arrears of said annuity and interest thereon, shall be ascertained according to the scale contained in the schedule to this indenture. And the said tenant doth hereby for himself, his heirs, executors, and administrators, covenant with the said Commissioners and their assigns that the said tenant, his executors, administrators, or assigns, will make the said half-yearly payments at the times and in the manner hereinbefore provided, and will duly expend the said sum and every advance made on account thereof, after deducting the charges for the Commissioners' expenses in and upon the said works on the lands above mentioned, and will maintain the works in an efficient state, and will permit any person for the time being appointed by the said Commissioners at all reasonable times to enter and inspect the said works. And further, that he or they will, so long as any money remains due on this security, pay the rent and observe and perform all the conditions of his or their tenancy in the said lands, and will not do anything whereby such tenancy would become liable to be determined. And will, from time to time, when required by the said Commissioners or their assigns, produce the receipts for the rent so payable as aforesaid. And it is hereby declared that the powers given to mortgagees by sections 19 to 24, both inclusive, of the Conveyancing and Law of Property Act, 1881, shall apply to the security hereby created, but with this variation, that the powers of sale conferred by the same Act shall become exercisable from time to time, in case the said tenant, his executors, administrators, or assigns, shall make default in respect of any half-yearly payment under these presents for the space of six calendar months next after either of the gale days hereby appointed for

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the payment of the same, or fail to observe any of the covenants contained in this indenture.

"In witness whereof the said tenant hath hereunto subscribed his name and affixed his seal, and the said Commissioners have hereunto caused their common seal to be affixed the day and year first in these presents written.

"Signed, sealed, and delivered by the said tenant in presence of
"THOMAS CONLAN, P.P.,
"Curry.
"JOHN O'CONNOR.
} MICHAEL LOFTUS. (Seal.)"

The loan was advanced in four instalments, and repayments were made from time to time from April 21st, 1884, down to May 6th, 1893, the last payment that was made. Michael Loftus was made a bankrupt, and his interest in the lands was sold by his assignees in bankruptcy and purchased by the defendant Thomas Howley, subject to the charge to the Board of Works, but no payment was made by him.

On April 2nd, 1912, the writ in this action was issued by the Commissioners of Public Works against Thomas Howley, claiming to have an account taken of what was due on foot of the charge, payment of the sum found due, and, if necessary, enforcement of payment by sale or receiver. By order of May 17th, 1912, the Attorney-General for Ireland was added as a plaintiff.

The statement of claim delivered on June 25th, 1912, stated the substance of the deed of charge above set out, the advance of £245, and the vesting of the interest of Michael Loftus in the defendant as occupier. Paragraph 5 was as follows:—"The said Commissioners claim that in the execution of the powers so vested in them by the said Acts as aforesaid, and in making in pursuance of the said powers the said advance, the said Commissioners acted on behalf of and represented His Majesty and His Majesty's Lords of the Treasury, and that the moneys now due and owing out of the said lands in respect of the said advance are payable to them in the capacity aforesaid, and the plaintiff, His Majesty's

Attorney-General for Ireland, sues on behalf of and as representing His Majesty."

The plaintiffs claimed—(1) An inquiry to ascertain what lands now in the possession and occupation of the defendant are comprised in and affected by the said deed of charge of 3rd January, 1884.

(2) An account of what is due to them for principal, interest, and costs on foot of the said indenture.

(3) Payment of the sum found to be so due to the plaintiffs on the taking of such accounts as aforesaid, and that, if necessary, such payment may be enforced by a sale of the said lands in the possession and occupation of the defendants so as aforesaid found to be comprised in and affected by the said deed of charge, or by the appointment of a receiver over the rents and profits thereof, or by both, or as the Court may direct.

It appeared from particulars furnished by the plaintiffs that the amount due to the Commissioners on foot of principal was £171 1*s.* 0*d.* and for interest £43 18*s.* 1*d.* The defendant by his defence admitted the execution of the deed, and that the lands were vested in him as occupier, and averred as follows:—"By notice of particulars delivered by the plaintiffs, and dated 3rd July, 1912, it appears that the last payment made on foot of any moneys secured by the indenture mentioned in the first paragraph of the statement of claim, was made on the 6th May, 1893, before the defendant became possessed of or entitled to any part of the lands comprised in the said indenture, and charged thereby; and it further appears by the said notice of particulars that, as by the said indenture provided, all the advances made by the plaintiffs, the Commissioners of Public Works in Ireland, on the security of the said indenture, with interest thereon so far as such advances were then unpaid, became payable to the said Commissioners as a present debt on the 10th April, 1894, and the defendant accordingly relies on the Statutes of Limitations of actions and suits and the decisions of Courts of Equity as to taking notice of such actions, and the defendant does not admit that the said Commissioners acted for or represented or represent His Majesty or His Majesty's Lords of the Treasury, as alleged in the fifth paragraph of the Statement of Claim, so as to disentitle the defendant to rely upon the said statutes,

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but the defendant says that all moneys secured by the said indenture have become statute-barred and irrecoverable, and that the charge created by the said indenture has been extinguished by the said statutes."

The action came on for trial on May 15th, 1913.

The Right Hon. The Attorney-General (*The Rt. Hon. T. F. Molony, K.C.*), *The Solicitor-General* (*J. F. Moriarty, K.C.*), and *Macafee*, for the plaintiffs:—

The loan was made pursuant to section 31 (2) of the Land Law (Ireland) Act, 1881, which provides as follows:—"The Treasury may authorize the Board of Works to make advances for like purposes to an occupier of land, when satisfied that the tenancy or other security which he may have to offer is such as to ensure repayment of principal and interest within such number of years as the Treasury may fix, or when the landlord joins the occupier in giving such security. Any advance to an occupier under this sub-section shall be subject to the provisions of the Landed Property Improvement (Ireland) Acts, so far as the Treasury may declare the same to be applicable."

The loan is not made by the Board of Works; each loan requires to be authorized by the Treasury. A Treasury minute was made on December 21st, 1881, pursuant to this sub-section, and was published in the *Dublin Gazette* of January 3rd, 1882. By it the Lords of the Treasury declare that, in execution of the powers given to them by the above sub-section, the following provisions, which under the Landed Property Improvement (Ireland) Acts are applicable to advances to owners, are also applicable *mutatis mutandis* to advances to occupiers under the Land Law (Ireland) Act, 1881, namely—10 & 11 Vict. c. 32, sections 3, 4, 5, 13, 14, 16, 17, 18, 23, 27, 29, 30, 31, 32, 56–60, 65; 12 & 13 Vict. c. 59, sections 1–4; 15 & 16 Vict. c. 34; 23 & 24 Vict. c. 19; 24 & 25 Vict. c. 71; 25 & 26 Vict. c. 29, section 3; 29 & 30 Vict. c. 40, section 5.

Section 3 of 10 & 11 Vict. c. 32 made the Commissioners of Public Works in Ireland Commissioners for the execution of the Act and a corporation for the purposes of the Act. Section 4 authorized them to make loans subject to rules and

regulations of the Treasury; section 5 provided that no loan should be made until the application for the sum should have been submitted to and sanctioned by the Treasury. Section 18 provided for the making of rules with the sanction of the Treasury.

The deed of charge in this case is in the form prescribed in the schedule to the Treasury minute; the Commissioners are the mortgagees, but are such only as agents for the Treasury. It incorporates sections of the Conveyancing Act, 1881, which are printed at the end of the deed. The next Act, 12 & 13 Vict. c. 59, section 1, made the certificate of the Paymaster of Civil Services in Ireland, or of such person as the Treasury might from time to time appoint, conclusive evidence as to the amount of the loan and rentcharge and lands charged and amount due. 24 & 25 Vict. c. 71 dealt with the performance of duties heretofore performed by the Paymaster of Civil Services in Ireland, and authorized the Treasury to make regulations in respect of loans of public money (section 1), and for the transfer of the books belonging to the Paymaster to the office of the Commissioners of Public Works (section 3), and for the discharge by the Commissioners or such other person as the Treasury might appoint of acts theretofore performed by the Paymaster (section 4). Regulations were made by Treasury minute on September 30th, 1861, under this Act. 25 & 26 Vict. c. 29, section 3, enabled the Commissioners to fix limits of time for completion of works under the Landed Property Improvement Acts. 29 & 30 Vict. c. 40, s. 5, authorized additional purposes for which loans might be made.

The Local Loans Act, 1887 (50 & 51 Vict. c. 16), shows that the debt was due to the Crown. Section 6 provides for the advance by the National Debt Commissioners of money authorized by Parliament for local loans. Acts are passed annually wiping out certain loans as irrecoverable, *e.g.*, the Public Works Loans Act, 1911, 1 & 2 Geo. 5, c. 17. They show that the Treasury has to bear the loss in such cases. The Attorney-General can always sue for money due to the King. Even if the Attorney-General were not a plaintiff, the Board would be entitled to recover, as it was Crown money which was advanced. If it was Crown money, the Statute of Limitations does not apply.

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The Board can be, and are, servants of the Crown as well as a corporation by statute: *Murphy* v. *Soady*, reported in a note to *Wheeler* v. *Commissioners of Public Works* (1), at p. 213: *Reg.* v. *McCann* (2). In *Murphy* v. *Soady* (1), the Board of Works were held to be servants of the Crown, and not liable for injury to the plaintiff alleged to have been caused by an iron railing erected in the Phœnix Park by the Board. In *Wheeler's Case* (1) the majority of the Court of Appeal held that the Board was liable for injury to the plaintiff caused by coming in contact with an iron railing erected in a dangerous way by the Board in Stephen's Green, but that decision turned on the position of the Board under the Stephen's Green Act, as a body corporate entrusted with duties of a public nature, but not agents of the Crown. In *Bishop of Rochester* v. *Le Fanu* (3), firstfruits and tenths, which were payable to the Crown, were transferred for collection to the Governors of Queen Anne's Bounty, and it was held that, notwithstanding the transfer, they were debts due to the Crown.

Ronan, K.C., *Fetherstonhaugh*, K.C., and *Leonard*, for the defendant:—

There is no debt due by the defendant, therefore payment cannot be had. What is sought is to have the amount declared a charge on the land, and enforced by receiver or sale. The Treasury minute of December 21st, 1861, only incorporates certain sections of 10 & 11 Vict. c. 32, and excludes sections 20, 37, 39, and 40. Section 20 provides for the making of an order for a loan; section 37 provides that in case any loan shall be made the lands specified in the order shall be charged with payment to Her Majesty of an annual rentcharge; section 39 provides, if the rentcharge is not paid half-yearly, that the Court of Chancery in Ireland may, upon the petition of the Attorney-General for Ireland, appoint a receiver; and section 40 provides that, if the rentcharge which is unpaid does not exceed £50, in addition to the other powers given by the Act, it shall be lawful for the Attorney-General for Ireland to receive the same by

(1) [1903] 2 I. R. 202.
(2) L. R. 3 Q. B. 141.
(3) [1906] 2 Ch. 513.

civil bill. The insertion of an express power in a statute is the strongest proof that the power does not exist without it. Here the exclusion of these provisions giving the Attorney-General power to proceed for a rentcharge payable to Her Majesty shows that the procedure to be adopted in the case of loans made under the Treasury minute was not to be by the Attorney-General. The security is taken by a deed of charge to the Commissioners in their own name, with whom alone the borrower covenants, and who alone can enforce it. The Public Works (Ireland) Act of 1869 (32 & 33 Vict. c. 74), s. 2, constituted the Commissioners a corporation with power to hold lands.

Wheeler's Case (1) is the key to the present case. The principle for which we contend can be derived from the observations of Palles, C.B., at p. 235: "Parliament" (he says) "might have imposed upon the defendants obligations to private individuals which would have been inconsistent with their character as Crown servants." So here we say that by entering into a mortgage they were put in such a position. *Graham* v. *Commissioners of Works* (2), referred to by Palles, C.B., at p. 233, is an authority in favour of our contention. There the defendants were held liable in an action for damages for breach of contract for the erection of a public building. There the defendants were by statute incorporated for all purposes, and made the contract in their own capacity. If they had been mere agents for the Crown, they could not have been sued. The judgments of Fitz Gibbon, Walker, and Holmes, L.JJ., in *Wheeler's Case* (1) are in our favour; they held that the defendants were not acting as servants of the Crown. If they are only subjects of the Crown like individuals, the whole sum became payable in 1894: *Reeves* v. *Butcher* (3), and the Statute of Limitations applies. Nothing was gained by adding the Attorney-General as a plaintiff. The Board was the hand to receive the money, and the fact that they had to account for it to the Treasury should make no difference, any more than if a trustee has to account for money received. A Crown debt is a debt due to the King,

(1) [1903] 2 I. R. 202.
(2) [1901] 2 K. B. 781.
(3) [1891] 2 Q. B. 509.

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for which he can sue in the name of the Attorney-General, but here the Commissioners alone can sue on the deed, not the Attorney-General or the Crown.

The Solicitor-General, in reply :—

The substance of the case must be looked at. The Commissioners could not sue by themselves, but I do not admit that the Attorney-General could not sue by himself. When money belonging to the Crown is lent through a public body, the Crown can recover it in the name of the Attorney-General ; he would represent the real owner of the money. The Board of Works are the servants of the Crown, except in cases where they are directed to do other duties, *e.g.* as in *Wheeler's Case* (1) by the Stephen's Green Act. Their character was altered by that Act, so as to make them liable. The only difference between Palles, C.B., and the other Judges there was, that he did not consider that the Stephen's Green Act had altered their character. All the Judges agreed that otherwise the Board could not be sued, as they were servants of the Crown. In *Murphy* v. *Soady*, it was held that the Board were servants of the Crown and could not be held liable: In *Campbell* v. *Hornsby* (2), *The Kingstown Harbour Case*, Deasy, B., says: "It is true that as Commissioners of Public Works they (the defendants) are officers of the Crown, but they fill, in addition to that, a distinct corporate capacity, as Commissioners of Kingstown Harbour.

The preamble of 24 & 25 Vict. c. 71, and section 4, are important. By that section the Commissioners of Public Works might do all acts which the Paymaster of Civil Services might do. That shows that they are servants of the Crown. Before this Act of 1861 the duties of the Paymaster of Civil Services as to moneys received were prescribed by sections 41, 44, and 50 of the Act of 1847 ; they were paid into the Bank of Ireland, to the credit of the Paymaster of Civil Services, and by him carried to the account of the Consolidated Fund.

The omission of the Treasury to apply sections 20, 37, 39, and 40

(1) [1903] 2 Ir. R. 202. (2) I. R. 7 C. L. 82.

of the Act of 1847, makes no difference as to the power of the Commissioners or of the Attorney-General to sue. That Act dealt with advances to owners, and rentcharges payable by them. The Treasury in effect say, We will allow the loan to be made by our servants the Board of Works. The Conveyancing Act, 1881, had just passed, and certain sections of it were made applicable to the deed of charge, which was prescribed as the security to be given by an occupier.

Loftus had applied to the Treasury for a loan, and the Treasury approved of the loan being made to him. The money when repaid was lodged in the Bank of Ireland to the credit of the Treasury in respect of the advance. The Commissioners were not principals, though they could sue in their own names. They acted as servants of the Crown as regards this money.

The Master of the Rolls reserved judgment.

O'CONNOR, M.R.:— June 25.

This action raises a question of great importance to His Majesty's Treasury, viz., whether the recovery of loans made by the Board of Works to occupiers of land under section 31, sub-section (2), of the Land Law (Ireland) Act, 1881, may be barred by the lapse of time under the statutes for the limitation of actions.

In the present case the Commissioners of Public Works on the 13th January, 1884, made a loan to Michael Loftus, an occupying tenant from year to year of lands in the county of Sligo, of a sum of £245 repayable by an annuity of £6 10*s.* per cent. per annum, payable half-yearly on the 5th April and 10th October during a period of twenty-two years. This loan was secured by a deed of charge, bearing date 3rd January, 1884, made between Michael Loftus of the one part, and the Commissioners of Public Works of the other part, whereby the amount of the loan, with interest at the rate of 3½ per cent. per annum, was charged on the lands, subject to a proviso that the loan might be discharged by the payment of the annuity above mentioned, and to a further proviso that in default of any half-yearly payment of the annuity for six calendar months the advance made by the Board of Works,

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with interest, should, so far as same remained unpaid, forthwith become repayable.

Michael Loftus's interest in the lands subsequently became, and is now, vested in the defendant.

The annuity in repayment of the loan was paid down to the year 1893, the last payment having been made on the 6th May, 1893. After making allowance for all payments made, there remained due the principal sum of £171 1s., with accruing interest. The entire principal sum, therefore, became payable as a present debt in the year 1894. Under these circumstances the defendant contends that the debt is barred by the lapse of time. The Attorney-General contends that the debt is a Crown debt, and that the Statutes of Limitations do not apply.

In the action as at present constituted the Attorney-General and the Commissioners of Public Works are plaintiffs, but in the original writ of summons the Commissioners were the sole plaintiffs. The writ was subsequently amended by adding the Attorney-General as a plaintiff. The reason for this amendment is obvious. It was feared that the defence under the Statutes of Limitations would be held to prevail against the Commissioners of Public Works, while the opinion was entertained that the liability of the defendant in the nature of a Crown debt could be more easily established in an action by the Attorney-General suing on behalf of the King. It is clear, however, that the character of the debt could not be changed by the form of the action. The question for determination is, what was the nature of the liability as originally incurred?

The advance, as I have said, was made in pursuance of section 31, sub-section (2), of the Land Law (Ireland) Act, 1881. This authorizes the Board of Works to make advances to an occupier of land when satisfied that the tenancy or other security which he may have to offer is such as to ensure repayment of principal and interest within such number of years as the Treasury may fix, and it enacts that any advance to an occupier under this sub-section shall be subject to the provisions of the Landed Property Improvement (Ireland) Acts so far as the Treasury may declare same to be applicable. This brings us to the 10 & 11 Vict. c. 32 an Act to facilitate the Improvement of

Landed Property in Ireland), which enabled the Commissioners to make loans for the improvement of lands out of moneys to be advanced by His Majesty's Treasury. This Act provides (section 20) that, when a loan is sanctioned, an order shall be made by the Commissioners with respect to the making of the loan, and containing the name of the lands to be charged with the loan, and also (section 37) that, in case any loan shall be made, the lands specified in the order shall become charged with the payment to Her Majesty of an annual rentcharge of £6 10*s.* per cent., to be payable for the term of twenty-two years by half-yearly payments. It is to be observed that the liability of the borrower for repayment is imposed by this section, and in express terms the liability under it is a liability to the Crown. The remedies for the enforcement of this liability are given by sections 39 and 40, these remedies being the appointment of a receiver by the Court of Chancery upon the petition of the Attorney-General, and, in the case of the sum to be recovered being not more than £50, a civil bill by the Attorney-General.

It is manifest that liability under this Act is a Crown debt, and if the present case were governed exclusively by it, the liability of the defendant's land would be a liability to the Crown.

The 31st section of the Land Law (Ireland) Act, 1881, only applies the Landed Property Improvement (Ireland) Acts "so far as the Treasury may declare the same to be applicable," and the Lords of the Treasury by their minute, dated the 21st December, 1881, declared certain provisions of 10 & 11 Vict. c. 32, to be applicable to advances to occupiers under the Land Law (Ireland) Act, 1881. These provisions do not include sections 20, 37, 39, and 40, which I have referred to. They must have been omitted for some purpose, and as it is by these sections that the liability for the repayment of loans made under 10 & 11 Vict. c. 32, is given the character of a Crown debt, the conclusion seems to be reasonable that it was intended to change its character. The minute, moreover, prescribes the form of security to be given by the borrower. It is no longer to be in the nature of a charge created by the joint operation of an order of the Commissioners and the Act of Parliament, but by a deed of charge and deed of

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covenant by sureties to be executed by the borrower in favour of the Commissioners—such a deed as might be executed by any private borrower to secure a loan made by any private lender. A form of this deed is set forth in a schedule to the Treasury minute. Its main features are:—An indenture made between the borrower of the one part and the Commissioners of the other part—a charge by the borrower with the payment to the Commissioners of the amount advanced with interest, with a proviso for redemption on payment to the Commissioners of an annuity, and a further proviso that on default in payment of the annuity the whole debt remaining unpaid shall be payable to the Commissioners as a present debt—a covenant with the Commissioners for payment—other usual clauses to be found in mortgage deeds, with a clause incorporating sections 19 to 24 of the Conveyancing and Law of Property Act, 1881, with a variation. The deliberate omission of the sections I have mentioned from the Treasury minute, and the prescription of the form of deed, seem to prove conclusively that it was intended to change the character of the liability from that of one to the Crown to a liability to the corporate body of the Commissioners of Public Works.

It was argued that they are only the servants of the Crown, and that a debt due to them is a debt due to the Crown, but this does not bear examination. Not only does the prescribed deed purport to create a liability on the part of the borrower, but it gives him the rights of every mortgagor, *i.e.*, a right of redemption, and if the Attorney-General's argument were valid, such right of redemption could only be asserted by a petition of right, which is plainly against the intention of the deed.

The Bishop of Rochester v. *Le Fanu* (1) was cited as an authority for the proposition that the transfer of Crown moneys to a public department, to whom is assigned the duty of collecting them, does not deprive them of their character of Crown moneys, or the persons owing them of the character of Crown debtors. In that case the moneys in question were firstfruits and tenths which had been transferred for collection to the Governors of Queen Anne's

(1) [1906] 2 Ch. 513.

Bounty. It was held that, notwithstanding the transfer, the moneys owing were debts due to the Crown. Reference, however, to the judgment of Swinfen-Eady, J., shows that it turned upon the special provisions of 2 & 3 Anne, c. 20, and the Queen Anne's Bounty Act, 1838, by which the character of the moneys and the remedy theretofore in use in Her Majesty's name in the Court of Exchequer or otherwise were preserved. This makes the case very unlike the present one.

I do not think it necessary to refer to other authorities which were cited. They seem to me to have no application, holding as I do that the Treasury minute was intended to make the borrower's obligation for repayment of the loan a private debt due to the Commissioners in their corporate capacity, and not a debt due to the Crown.

I must therefore dismiss the action with costs, to be paid by the Commissioners of Public Works.

Solicitors for the plaintiffs : *W. G. Towers.*
Solicitor for the defendant : *M. J. Howley.*

W. L.

Appeal.
1912.
Jan. 16, 17, 26.

HENRY MARTIN AND ROBERT JOHNSON *v.* JAMES WILSON AND ALEXANDER WILSON (1).

Executor—Liability for acting unreasonably—Vexatious and unjustifiable conduct—Costs thereby incurred.

A testator devised his house and lands of D., which were registered under the provisions of the Local Registration of Title (Ireland) Act, 1891, to H. A. W., subject to the right of the testator's wife to reside in certain rooms of the house, and on the condition that H. A. W. should reside in the house; should H. A. W. not reside in the house at D., the testator devised the house and lands to J. W. on like conditions, and he appointed H. A. W. and J. W. his executors, who proved the will. H. A. W. was a merchant carrying on business in the town of E., where at the time of the testator's death he resided with his family; and J. W. resided in England. There was evidence that after the testator's death H. A. W. usually slept in the house at D. and worked the lands, driving in each day to E. (distant about seven miles), where he continued to carry on his business. In the course of the administration of the testator's estate, J. W. required H. A. W. to give satisfactory evidence that he had complied with the condition in the will as to residence at D., which H. A. W. refused to do, save by alleging that he had done so, and was residing there. H. A. W. subsequently died, and J. W. refused to sign an assent to the devise, or to join in a conveyance of the lands to a purchaser, alleging that the conditions of the will had not been complied with. The present action was then brought against J. W. by the executors of H. A. W., claiming a declaration that the latter was in his lifetime rightly in possession of the lands of D., an order that J. W. should do all acts necessary to have the plaintiffs registered as owners under the Local Registration of Title (Ireland) Act, 1891, and claiming costs against J. W.; whereupon the latter offered to do whatever was necessary in his capacity of surviving executor to assent to the devise to H. A. W., on his being paid his proper charges and expenses. The plaintiffs, however, claimed that J. W. was bound to indemnify them against the costs already incurred in the action, with which they proceeded.

Held, by the Court of Appeal (The Rt. Hon. Redmond Barry, C., and Holmes, L.J., Cherry, L.J., dissenting), reversing the order of the Rt. Hon. R. E. Meredith, M.R., that the action of J. W. in refusing to assent to the devise was not unreasonable, and that he was entitled to his costs of the action.

(1) Before THE LORD CHANCELLOR (THE RT. HON. REDMOND BARRY) and HOLMES and CHERRY, L.JJ.

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This was an appeal, by the defendant James Wilson, from so much of the order of the Master of the Rolls (the Right Hon. R. E. Meredith) as directed him to pay the plaintiffs' costs of this action, which was brought claiming, (1) a declaration that one Henry A. Wilson was at the date of his death entitled to a farm of land at Drumohill in the county Fermanagh, devised to him by the will dated the 11th April, 1905, of Alexander Wilson, and that the conditions imposed by the said will had been performed; (2) an order that the defendants should be directed to do all acts necessary to have the plaintiffs registered as owners of the said farm under the provisions of the Local Registration of Title (Ir.) Act, 1891, and that the defendant James Wilson should give his assent as surviving executor of the will of the said Alexander Wilson to the said devise to the said Henry A. Wilson, and that, if necessary, the estate of the latter should be administered.

By his said will the said Alexander Wilson devised his farm in Drumohill, house, stock, &c., to his brother, the said Henry A. Wilson, subject to certain conditions, including the right of the testator's widow, Eliza Wilson, to reside in certain rooms in the house, and to receive an annuity, and providing that the said Henry A. Wilson should reside in the house. The testator then directed that if it should be inconvenient for the said Henry A. Wilson to reside in the house, the farm in Drumohill and all therein, together with the residue of his estate, should be given to his brother James (the present appellant), and should James be unable to reside in Drumohill, he gave the farm to his nephew, the defendant Alexander Wilson. He appointed his brothers, Henry A. Wilson and James Wilson, executors of his will.

Alexander Wilson, the testator, was registered as owner of the lands of Drumohill under the provisions of the Local Registration of Title (Ir.) Act, 1891; he died on the 12th July, 1905, and his said will was duly proved by the said Henry A. Wilson and James Wilson, on the 3rd March, 1906. At the date of Alexander Wilson's death the said Henry A. Wilson was a merchant, residing with his family in a house in Enniskillen, about seven miles from Drumohill. Evidence was given at the

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trial that from the death of the testator until his own death in 1909, Henry A. Wilson worked the lands of Drumohill, and slept in the house, driving into Enniskillen each day to attend to his business there. He never registered his title to the lands. James Wilson resided in Essex, and a lengthy correspondence which passed between him and his solicitors, Messrs. Helder, Roberts & Co., and Henry A. Wilson and his solicitor, Mr. Mayne, relating to the administration of Alexander Wilson's estate, was put in evidence, in the course of which correspondence James Wilson required evidence that Henry A. Wilson had in fact taken up his residence at Drumohill. On the 14th February, 1907, James Wilson wrote:—

> "If you will be good enough to give me a definite date when you put in a *bona fide* residence in Drumohill, as that is the only claim you have on it. If you fail at any time to carry out the condition laid down in the will, then Drumohill would not belong to you, and you never could sell it during your lifetime."

On the 5th September, 1907, Messrs. Helder, Roberts, & Co. wrote to Henry A. Wilson:—

> "As regards Drumohill, our instructions are that you have not complied with the terms of the will of the testator as you allege you have done, and we shall be glad if you will furnish us with the precise date when you entered into *bona fide* residence at that farm, in accordance with clause 7 of the will."

On the 24th September, 1907, Helder, Roberts, & Co. wrote:—

> "The account of your receipts and payments as executor is not satisfactory. . . . You have not sent us any vouchers, and your letter is silent as to when you first went into residence at Drumohill in accordance with clause 7 of the testator's will, notwithstanding the fact that we have asked you more than once to inform us. . . . We again repeat what we have said in our previous letter, viz., that we wish to be furnished with the precise date when you entered into *bona fide* residence at the farm, and we must ask you to be good enough to furnish us with a statutory declaration as to this date before we can satisfy our client that you have complied with clause 7 of the testator's will.

On the 2nd October, 1907, they wrote again, requiring production of vouchers for payments, and proof that Henry A. Wilson

had complied with the terms of the will, in default of which the institution of legal proceedings was threatened, in reply to which Henry A. Wilson wrote: "as regards your reference to clause No. 7, all I can say is that I imagine I have carried out to the letter that clause of the will. If I did not, your client would seem to see that I did," and he requested that further correspondence should be sent to his solicitor, Mr. Mayne.

Helder, Roberts, & Co. then, on the 9th October, 1907, wrote to Mr. Mayne, stating that their client had documentary evidence that Henry A. Wilson had not carried out the terms of the will, and asking for a statutory declaration or some satisfactory evidence that he had done so, to which Mr. Mayne replied that his client was satisfied that he had carried out the clause of the will, and that he was willing to accept service of any document that might be issued. Helder, Roberts, & Co., on the 23rd October, 1907, again wrote to Mr. Mayne insisting on proof that the will had been complied with, and stating "as regards Drumohill and clause 7 of the will, your client is well aware (and so are you) that he has not complied therewith. We are in possession of documentary evidence to show the contrary."

No further correspondence prior to the death of Henry A. Wilson was put in evidence.

The said Henry A. Wilson died on the 23rd October, 1909, having first made his will dated the 3rd August, 1909, probate of which was granted to the plaintiffs in this action, the executors therein named. By his said will the testator directed his executors, if they should think right, to sell all his lands, including Drumohill.

On the 22nd March, 1910, Mr. Mayne, acting on behalf of the plaintiffs, wrote to James Wilson as follows:—

Re H. A. WILSON, DECEASED.

"With reference to the farm in Drumohill, formerly held by the late Alexander Wilson, and subsequently by the above-named deceased, I wish to know if you, as the surviving executor of Alexander Wilson's will, will sign an assent to the devise of the lands to the late H. A. Wilson, or if you will join in a conveyance of the lands to the executors of H. A. Wilson, deceased, or to such person as the lands may be sold to by them."

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To this letter James Wilson replied on the 23rd March, stating:—

> "You know as well as I do that my late brother, H. A. Wilson, never complied with condition 7 of my late brother Alexander Wilson's will, and that he never put in a *bona fide* residence there, and that I never recognized him as the owner of Drumohill. . . I have been told on good authority that my late brother, H. A. Wilson, on the 3rd August, 1909, was totally incapable of making a will, and other things that I could mention cause me to decline to sign any document you refer to in your letter. Drumohill . . . cannot be sold."

The writ in this action was issued on the 6th June, 1910.

On the 16th June, 1910, Helder, Roberts, & Co. wrote to Mr. Mayne as follows:—

> "Our client considers that the terms of clause 7 of the will of the testator, Alexander Wilson, have not been complied with, inasmuch as it is contended by him that Mr. Henry A. Wilson (now deceased) did not enter into *bona fide* residence of the farm at Drumohill, in accordance with such clause; but as we observe the writ seeks for a declaration by the Court that Mr. Henry A. Wilson was at the time of his death rightly in possession of this farm, and as our client the defendant does not desire to make any claim thereto or to contest the question as to whether the conditions imposed by the will have been duly performed, he is prepared to do whatever may be necessary in his capacity as surviving executor of the will of Alexander Wilson to assent to the devise to the late Henry A. Wilson, and for an order being made that the plaintiffs be registered as owners of the farm in the Local Registry of Title, subject, however, to our client being paid all his proper costs, charges, and expenses which may be incurred in doing such acts as may be necessary for this purpose. Under these circumstances there is therefore no necessity to proceed further with the action, and if you will prepare and send us such form of assent and other documents necessary to be executed, we will peruse same on his behalf, and obtain his execution thereto in due course, on the clear understanding that our costs are provided for out of the estate of Alexander Wilson deceased."

On the 25th June, 1910, Mr. Mayne wrote suggesting that the most convenient course would be for James Wilson to join in a conveyance of the lands of Drumohill to a purchaser, which would enable the purchaser to be registered as owner, and stating

that he considered that James Wilson was liable for the costs of the writ and of an order that had been obtained for service out of the jurisdiction. To this Helder, Roberts, & Co. replied on the 29th June, 1910, stating that they would advise James Wilson to join in a conveyance to a purchaser, on the understanding that all his costs were provided for, but denying any liability on his part for the costs incurred in the action. Further correspondence to the like effect followed, but no settlement was arrived at, and the action proceeded.

The defendant James Wilson pleaded by his defence that he duly assented to the bequest of the farm to Henry A. Wilson when the latter went into possession, that the farm became absolutely vested in Henry A. Wilson, subject to the due performance by him of the conditions mentioned in the will, and that it was not incumbent on him as executor of Alexander Wilson to determine, and that he had no power to declare, how far the said conditions had been complied with since that date; that he had never refused to assent to the bequest of the farm to Henry A. Wilson subject to the conditions imposed by the will, and was always ready and willing to assist the plaintiffs in obtaining registration of the farm under the provisions of the Local Registration of Title (Ireland) Act, 1891, but was never requested to do so prior to the issue of the writ; that he never claimed any personal interest in the farm; and he relied on the above-mentioned letter of the 16th June, 1910.

No appearance was entered by the defendant Alexander Wilson.

At the hearing of the action, certain letters written by the widow of Alexander Wilson, who was then living at Drumohill, to the defendant James Wilson, were offered in evidence by the latter, for the purpose of proving that his belief that Henry A. Wilson was not residing *bona fide* on the farm was well grounded. The Master of the Rolls refused to allow these letters to be put in evidence, but they were subsequently admitted by the Court of Appeal. In the first letter, dated the 17th October, 1905, Mrs. Wilson wrote in reference to Henry A. Wilson, "He comes out once in the week, brings me all I want, has been very good to

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me so far. I am always glad to see him coming, for I am very lonely here." In a letter of the 26th February, 1907, she wrote, "I am sorry if you misunderstood me as regards Henry coming here. I did not mean you to think that he stayed here night and day; he comes out every Saturday night, and stops till Monday evening, and sometimes comes again on Tuesday evening, and stays till Wednesday evening." On the 20th February, 1910, she wrote of a conversation she had had with Mr. Mayne, in which she told him, "That my late husband's will must be carried out, and that everything was to be given over to you in case Henry failed to keep up the place, which he failed to do . . . I said you knew perfectly well that Henry Wilson never carried out the will as he should have done."

The Master of the Rolls gave judgment for the plaintiffs, with costs against James Wilson, holding that the conditions of the will as to residence in Drumohill had been complied with by Henry A. Wilson; that James Wilson knew that there was no foundation for his allegation to the contrary: and that, as the action had been rendered necessary by his conduct, he should pay the entire costs of the action. Hence this appeal as to costs.

Oulton, *K.C.*, and *M'Gusty*, for the appellant:—

The appellant, so far from being compelled to pay the costs of the action, should be allowed his costs out of the estate of Alexander Wilson. Once he assented to the bequest to Henry A. Wilson, the lands vested in the latter without any assignment: see *In re Culverhouse*, *Cook* v. *Culverhouse* (1). The appellant was entitled to satisfy himself by "reasonable inquiry and investigation" that Henry A. Wilson had carried out the conditions of the will as to residence: *Re Chapman*, *Freeman* v. *Parker* (2). When he was refused satisfactory proof of that, it cannot be said that his conduct was unreasonable or vexatious. The right of a trustee to costs is a matter of contract, not in the discretion of a Judge, unless in the case of his acting so unreasonably or vexatiously as to amount to misconduct: *Turner* v. *Hancock* (3);

(1) [1896] 2 Ch. 251.
(2) 72 L. T. R. 66.
(3) 20 Ch. D. 303, at 305.

see also *Re Pugh*; *Lewis* v. *Pritchard* (1); *In re Jones, Christmas* v. *Jones* (2). In *In re Chennell, Jones* v. *Chennell* (3), Jessell, M.R., said that although the Court has a discretion to deprive a trustee of costs for gross misconduct, "it is a violent exercise of the Court's discretion to deprive a trustee of his charges and expenses."

Herbert Wilson, K.C., and *T. Patton*, for the respondents:—

The order as to costs was right on two grounds. The appellant knew that if Henry A. Wilson failed to perform the condition imposed on him of residing at Drumohill, he himself would be entitled to the farm; he was really, therefore, playing for his own hand. In any case he was guilty of misconduct in refusing to assent to the bequest, or to convey to a purchaser. Under sect. 84 of the Local Registration of Title (Ir.) Act, 1891, these lands vested in Alexander Wilson's executors, as sole owners, as trustees for those beneficially entitled, who had a right of requiring a transfer (sect. 86). Under sect. 87 it was the duty of the executors to assent to the bequest in the prescribed form. It was to such an "assent" Mr. Mayne's letter of the 22nd March, 1910, referred. There were absolutely no grounds for withholding such assent, and the action was rendered necessary by the appellant's own misconduct. In *Coppinger* v. *Shekleton* (4) the defendant, who out of excessive caution refused to transfer trust funds to new trustees, was made pay the costs of an action brought to compel the transfer. In *De Burgh* v. *M'Clintock* (5) the defendants, who were trustees of a will, and who refused to pay over a legacy to the plaintiff on her attaining twenty-one, without one of them having a personal interview with her to explain her rights, were made to pay the costs of the action brought to recover the legacy. There, as in the present case, the defendants agreed, once the action was brought, to do what they were asked to do, and Sir E. Sullivan, M.R., in awarding costs against the defendants, said that one test of the question of costs was, that the defendants then knew no more of the position and circumstances

(1) 57 L. T. R. 858.
(2) [1897] 2 Ch. 190.
(3) 8 Ch. D. 492, at 502.
(4) 15 L. R. Ir. 461.
(5) 11 L. R. Ir. 220.

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of the plaintiff than they did before. In *Brown* v. *How* (1) trustees were made to pay the costs of a suit "as being the authors of it." As to the general rule of costs following the event, see Ord. 65, Rule 1, and sect. 53 of the Judicature (Ir.) Act, 1877.

Oulton, in reply.

Cur. adv. vult.

Jan. 26.

THE LORD CHANCELLOR:—

By his order, the subject of the present appeal, the Master of the Rolls directed that all the costs of this suit should be personally borne by James Wilson, the surviving executor of the deceased, Alexander Wilson. It is admitted that the order could be justified only on the conclusion that the defendant James Wilson had as such executor been guilty of misconduct, or vexatious conduct, but for which the action would have been wholly unnecessary. There was no question of any such negligence on the defendant's part as might make it possible for the Court to impose such an order upon him. Indeed, the Master of the Rolls rested his judgment on the express ground that in the relations and negotiations between him and the plaintiffs, the appellant acted on a pretended view of the facts which he knew to be false and unfounded. That is a grave imputation, and it is the question of fact involved in it that is the subject at issue in this argument. The onus of the contention lies on the respondents, and it is not disputed that, according to the fixed law and rules of our Courts, the executor, in a case like the present, is entitled as a matter of right to the payment of his costs, unless indeed the misconduct alleged against him be proved and established. In the absence of such proof the Court would, in this case, possess no discretion on the subject of the executor's costs, but would be bound to award them to him.

I have carefully examined the available evidence in the case, which consists chiefly of correspondence that took place between the defendant James Wilson, and his late brother, Henry Wilson, whose executors the plaintiffs are, and their respective solicitors; and between the defendant and the plaintiffs and their solicitors. There was also some evidence given orally at the trial of the action, but it will not require any lengthened consideration.

(1) Barnardiston's Ch. Cas. 354 at 358.

The defendant James, and his deceased brother, Henry Wilson, were the joint executors of their brother, Alexander Wilson, who died in July, 1905. By his will, dated April, 1905, the testator, after disposing of other property, gave his farm of Drumohill in the county Fermanagh, with the stock thereon, to his brother, the said Henry Wilson; but subject to the condition that Henry should live in the house upon the lands. If Henry was unable to comply with that condition as to residence, the lands and the stock thereon were to pass to the defendant James Wilson, but on the same terms and conditions. In the event of non-compliance with the provisions in the will on James's part, the lands were given to be the absolute property of Alexander Wilson, a nephew of the deceased. There were certain reservations of living in the house at Drumohill in favour of testator's widow, Mrs. Eliza Wilson. Provision was also made for the supply to her of certain farm produce, and for the payment of a yearly sum. There were other obligations also placed upon the person who would become the owner of the lands.

Henry, at the time of his brother's death, was a merchant in a large way of business at Enniskillen, which is situate about seven miles from Drumohill. He was a married man with a family, and had a large and, I understand, well-equipped house in the town, in which he and his family resided. The defendant James had been an officer in the London police, but had then, or, soon after, retired, and, I presume, on a pension, so that his home was in England—I gather in county Essex. It was natural under the circumstances that Henry, who was in Ireland, should undertake the administration, and in fact he did. A good deal had to be done, and, as was not unlikely in the situation, discussions and controversies arose from time to time between Henry and the defendant James, who called upon him on repeated occasions to render to him, as his co-executor, full accounts and proper receipts and vouchers in connexion with the administration. The correspondence in the case must be divided into two periods; the first between Alexander's death and October, 1907, and the second between March, 1910, and August, 1910. Henry Wilson, it is to be noticed, died in October, 1909, and probate of his will was granted to the plaintiffs as his executors on December 22nd of

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the same year. I should mention here that Drumohill had been sold to Alexander Wilson, the deceased in this matter, under the Land Purchase Acts, but though the fee-simple was vested in him, the property descended, as if a chattel real, to the executors. The premises were at the time, and I think are down to the present time, subject to the payment of annuities to the Land Commission in respect of the advances made for the purchase. During his four years of occupation Henry never registered his ownership under the Local Registration of Title Act, 1891, and no explanation was offered of his neglect to do so.

In the first letter in evidence, dated February 14th, 1907, the defendant, writing from Essex to his brother Henry, after dealing with other matters connected with the administration of Alexander's estate, asked Henry to give him a definite date when he took up a *bona fide* residence in Drumohill, as that was the only claim Henry had on the lands. James pointed out that if Henry failed to comply with the conditions laid down in Alexander's will, Drumohill would not belong to him, and he could never sell it during his lifetime. James, also, in dealing with other matters relating to the estate, referred to an affidavit sworn by Henry, which James said was false and incorrect; and it was already plain that James had no real confidence in the truthfulness or accuracy of Henry. Further letters were written in that year by James and his solicitors to Henry and his solicitor, relating to the accounts in the matter, and in several of them a definite requisition was made to Henry to state definitely when he had taken up his residence at Drumohill, and to give some evidence of the fact, if it was a fact. The first reply that I can find in the matter is in the course of a letter from Henry dated October 5th, 1907, in which Henry said that on that question all he could say was, that he imagined he had carried out to the letter that clause of the will. He was writing to James's solicitors, and it is some indication of his temper that he added the sentence "If I did not, your client would seem to see that I did." Finally he said that James was trying to give trouble, and he referred him in further correspondence to a solicitor practising in Enniskillen, Mr. Mayne. James's solicitors opened a correspondence with Mr. Mayne in the month of October, and complaints

were made by them of the evasive answers given regarding Henry's residence at Drumohill, and calling attention to the fact that the defendant had documentary evidence showing that Henry had not conformed to the residence clause in the will. The solicitor asked for a statutory declaration or other satisfactory evidence of the fact. I shall allude hereafter to the documentary evidence referred to as in the possession of the defendant James Wilson, but a more reasonable and proper request could not, in my opinion, be made, than that by the defendant to his brother, namely, to ask for some satisfactory proof that he in fact had acted up to the condition on which alone he was entitled to hold the lands under Alexander's will. James was not merely entitled, but I think as executor was bound, to ascertain the fact as best he could; and his just inquiries were met with nothing but evasive replies, and the simple course suggested of a statutory declaration was simply passed over in silence. The only answer made was by Mr. Mayne in a letter of October 17th, 1907, in which he said that his client was satisfied that he had carried out the clause in the will (No. 7) relating to the matter, and that if the solicitors acting for the defendant James Wilson wished, he would accept service of any document they might issue against his client. That, to my mind, was an uncalled for and unjustifiable attitude for Henry and his advisers to take up, and it was no wonder that it drew the reply from James's solicitors on October 23rd, 1907, in which they said that as regards Drumohill "your client was well aware (and so are you) that he has not complied with clause 7 in the will," and that they were in possession of documentary evidence to show the contrary. I do not know to what the defendant referred in the case of Mr. Mayne; but Henry at any rate knew the whole facts, and could have simply stated and proved them according to the truth. His refusal to do this was indefensible in my judgment, and the request for proof by the co-executor, James, was right and proper. Prior to this correspondence, and forming clearly the main ground of it, were letters previously received by James Wilson from his sister-in-law, Mrs. Eliza Wilson, Alexander's widow, who was living at Drumohill. On October 17th, 1905, she informed the defendant that Henry used to come out once in the week, and brought her all she wanted, and had been very good to

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her. She added that she was always glad to see him coming, for she was very lonely at Drumohill. I express no dissent from the judgment of the Master of the Rolls, deciding, in the circumstances of the trial, that the conditions of the will had been complied with; but in view of the statement by Mrs. Wilson to the defendant, it would, I think, not be possible to impute to him unreasonableness, not to say misconduct, in pressing for evidence that Henry had in any real sense gone to live at Drumohill. The position was improved to some extent at a later period, for on February 26th, 1907, Mrs. Wilson wrote to the defendant saying that Henry comes out every Saturday night and stops till Monday evening, and sometimes comes again on Tuesday and stays till Wednesday evening. It was well worth judicial consideration whether or not the provision in the will was in the facts duly complied with; but, in my opinion, it is not possible to regard the disbelief of the defendant in the real residence of Henry at Drumohill, in accordance with the true meaning of the will, as any evidence of misconduct or unreasonableness on his part. No further letter, so far as we know, passed between Henry and James or their solicitors, and, as I have mentioned, Henry died in October, 1909.

It is an important fact to note at this stage that up to the date of Henry's death, neither by himself nor by his solicitors, was there ever any requisition for any act or assent on the part of the defendant James, with reference to Henry's interest or dealings in the lands.

On March 22nd, 1910, Mr. Mayne wrote to the defendant, on the part of the plaintiffs, as executors of Henry, asking him whether he would, as the surviving executor of Alexander Wilson, sign an assent to the devise of the lands to the late Henry Wilson, or would join in a conveyance of the lands to the executors of Henry Wilson, deceased, or to such person as the lands might be sold to by them. Having regard to the argument made before us, namely, that the assent asked for had reference to the Local Registration of Title Act, 1891, sect. 87, I do not find it possible to understand why a word was not said to that effect by Mr. Mayne in the course of his evidence at the trial. Above all,

it is a remarkable fact that in describing the effect of the correspondence in the statement of claim, in paragraph 10, the allegation is that the plaintiffs had repeatedly requested the defendant, before issue of the writ in the first place, to assent to the devise of the lands of Drumohill to the said Henry Wilson, and to declare that the said Henry A. Wilson had, before his death, complied with all the conditions imposed on the said devise by the will of the said Alexander Wilson. There are two other purposes ascribed to the correspondence, but neither of them has relation to the matter I am dealing with, and which, I think, is of grave importance, having regard to the argument in this Court, and I have no doubt as well the argument before the Master of the Rolls. The interpretation put by the statement of claim itself on the correspondence dealing with the term "assent," opening with Mr. Mayne's letter of March 22nd, 1910, is the construction I think it bears; and I confidently accept the contention on behalf of the appellant that it was in that sense he read and understood it. I cannot conceive, in dealing with an English solicitor, and the defendant resident in England, why direct reference was not made to the Act of 1891, if that was intended; and in the circumstances the defendant, in my judgment, interpreted the correspondence according to its natural and reasonable meaning, being the meaning given to it by the plaintiffs themselves in the formal presentation of their case. In that view of the letter, it was, to say the least of it, a temporizing one, to have been written by Mr. Mayne, with all the knowledge he had of the case, and with the full knowledge he must have had of the dissatisfaction of the defendant at the refusal in the previous years of the deceased, Henry, and of Mr. Mayne himself, to give him any satisfactory evidence of Henry's residence at Drumohill. What right had he to expect in the circumstances that the defendant should by any act of his, by which a purchaser might be gravely prejudiced, practically declare that in his judgment Henry had complied with the obligation placed on him to live on the lands devised to him, or convey the same impression by joining in any conveyance to a purchaser? What need, is it suggested, was there for James to join in a conveyance to a purchaser or to the executors of Henry? The only object that I

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can see was the indirect one of raising the opinion that, in the view of James, Henry was at his death the unquestionable owner of Drumohill. Thereby, not merely would any possible claim of James himself, but, above all, the claim of Alexander Wilson, the nephew, which I understand was articulate at the time, be shut off for ever. At least, it is plain, I think, that the plaintiffs so thought. How could James, in the frame of mind he was in relating to the matter, take the responsibility of agreeing to the proposal made? I think the view he took was that of a prudent man; and in reply to Mr. Mayne's letter of March 22nd, 1910, he wrote on the next day a letter, in which I personally fail to see any ground for the attack upon him for it made by the respondents in the appeal. He said that Mr. Mayne knew as well as he did that Henry Wilson never complied with the conditions of Alexander's will; that Henry had never gone into *bona fide* residence at Drumohill; and that he never recognized him as the owner of Drumohill. He added that he had heard on good authority that Henry, on August 3rd, 1909, was totally incapable of making a will, and he declined to sign any document referred to in Mr. Mayne's letter. He added that Drumohill could not be sold. The allusion to the incapacity of Henry to make a will was plainly founded on a letter dated February 20th, 1910, written by Mrs. Eliza Wilson to the defendant. In the letter Mrs. Eliza Wilson described to the defendant an interview she had with Mr. Mayne (I assume he was the Mr. Mayne in this case), in which, according to what she wrote, she said to him that Henry Wilson was not capable of making a will, and that it was he and Andy Wilson made it. If that be true, the statement on the matter in the defendant's letter could not have been a great surprise to Mr. Mayne, and he could not have attributed it to any malevolence on the part of the defendant. Although great reliance was laid by the respondents on that passage in the argument here, not a word was said about it in the course of the oral evidence, and not a question regarding it or the foundation for it was put to the defendant, who was examined as a witness at the trial.

There was no threat of litigation given by the plaintiffs, and the next step was to institute the present action and serve the

writ on the defendant. There was further correspondence, to which I think a general reference will be sufficient. The defendant said that he did not desire to make any claim to Drumohill on his own account, and generally that he was ready to take any course open to him in his capacity as executor, and he expressed his readiness not to contest the question as to whether the conditions of the will had been performed. Under these circumstances, he pointed out that there was no necessity for further proceedings; but he claimed that he should be paid out of Alexander's estate, or by the plaintiffs, as Henry's executors, any costs to which he might be put. A letter to that effect on 16th June, 1910, was written on the part of the defendant by his solicitors, and the reply from Mr. Mayne was again a request that defendant should join in a conveyance to a purchaser, and he said that defendant should pay the costs of the writ, and of the order for the service of it out of the jurisdiction. No agreement could be come to on the matter, Mr. Mayne insisting finally that while the costs of defendant, in doing any act as executor, would be paid, the costs of the action so far as it had gone should be paid by the defendant.

In the circumstances I see no reasonable objection to the claim made for costs by the defendant, and I do not think there was anything to justify the plaintiffs' insistence that he should pay the costs they had incurred. No one, I think, could justly censure any steps taken at this stage by the defendant so far as his own personal interests were concerned. In the face of what he wrote, and above all of what he pleaded, it is, I think, out of the question to say, as it has been said, that he was fighting in his own interest with a view to his succession to the land. The evidence in the case is, I think, all the other way, and there is nothing to suggest that he had any desire or intention of returning to Ireland to live in Drumohill, which would in his case also be a necessary condition for holding the lands. But while it does not affect so as to alter my view of the issue involved in this appeal, I cannot but think that in writing the letter of 16th June, 1910, the defendant and his advisers apparently forgot—they certainly overlooked—the interest of Alexander Wilson, the third person named as a possible successor to the lands under the will. In fact, his position in the matter at the time was such that I think a proceeding to

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obtain a declaration in favour of the plaintiffs, such as they claimed in the action and finally obtained, was a necessity for them, if they were to be in a position to make the most advantageous disposition of the property. The overlooking of Alexander's interest at that stage by the defendant is not, however, of any concern in the present appeal. It was nothing that the plaintiffs had any reason to complain of. For some reason, to the end unexplained, in the action as framed, no notice was taken by the plaintiffs of Alexander Wilson's previous position, but on a full statement of the clause in the will by the defendant in the defence, it became clear that the case could not be disposed of without making Alexander a defendant, and that was done. At the trial the defendant, I think, took a perfectly reasonable course in an action the costs of which it was sought by the plaintiffs to impose on him, and I think he owed it to the Court to lay before the Court the state of affairs to the extent he did.

It will be apparent that I do not agree with the Master of the Rolls' conception of the defendant's action in any part of the case. He says that the defendant put the plaintiffs to the expense of the trial wantonly and with his eyes open—and he added that in his opinion the defendant knew there was no foundation for the allegation that the condition of residence had not been fulfilled. How in the face of the letter of June 16th, 1910, and the succeeding letters on the part of defendant, could the learned judge say that the defendant wantonly and with his eyes open forced the action? and in the like manner the other conclusion is equally in contradiction of the written declaration of the plaintiff, and above all of his pleading in the statement of defence. I find no evidence to prove vexatious or unreasonable conduct, or any form of misconduct on the part of the defendant in any way leading to or accounting for the present action. In these circumstances the order of the Master of the Rolls should in my opinion be reversed.

My colleagues and I have reserved our judgment, in order that we might be able to give the fullest consideration to the questions raised. The case is not merely of real importance to the actual parties, but everyone must feel the public policy and interest involved in preserving and protecting in all just cases the

privileges of persons who, like executors and trustees, undertake great liabilities and labour on behalf of others, and but for whom there would have to be a big revolution in the practices and arrangements of the people. Responsible solvent persons should not be deterred from the undertaking of such offices by any questionable departure from the settled law and practice of the Courts. In the result, I am of opinion that there is nothing to displace the defendant's right as executor to be paid his costs, and I give my decision in the case accordingly.

HOLMES, L.J.:—

As the result of this appeal is of great importance to the character of a gentleman who has attained a high position in an honourable force, as well as to the rights of executors generally, I have written my opinion at perhaps too great length. The appeal is from so much of the judgment of the Master of the Rolls as directed the defendant, James Wilson, who was sued as the surviving executor of Alexander Wilson, to pay the costs of the action. The case has some peculiar features; but in so far as the appeal is concerned, the result depends upon whether the suit was rendered necessary by the bad or unreasonable conduct of James Wilson as executor. If it were, I should affirm the judgment, although if I had been in the Court of first instance, I should probably have thought that it would have been a sufficient penalty to leave the executor to bear his own costs, without making him liable for the costs of the plaintiffs. In such circumstances, the extent of the penalty ought to be in the discretion of the Judge—a discretion with which I should feel that I ought not to interfere; but having come to the conclusion on the evidence before the Court, that so far from James Wilson having acted improperly, he went beyond what he was bound to do, for the purpose of avoiding litigation, I hold that he ought not to have been deprived of his right to costs in an action to which he as an executor was a necessary party, and which was not the result of any misconduct on his part.

Alexander Wilson, who died in July, 1905, leaving a widow but no children, in the previous April made his will appointing

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his two brothers, Henry Wilson and James Wilson, executors. He seems to have been a well-to-do farmer, whose personal assets were sworn to be over £2,200—a valuation which did not err on the side of excess. The will was evidently prepared by an indifferent draftsman, and was calculated to give rise to questions somewhat difficult to solve. The testator lived on the farm of Drumohill, in which he had acquired a fee-simple estate under the Irish Land Purchase Acts, but which by the Local Registration of Title (Ireland) Act, 1891, would devolve on death as if it were a chattel real. By the will the testator gave this farm and all the rest of his property, except his farm and stock in Greentown, to his brother Henry Wilson, subject to the payment of several legacies, including a legacy of £500 for his widow, and a further sum of £250 to purchase her an annuity; subject also to her having the use of a specified portion of the residence at Drumohill, with certain other benefits connected therewith, and also subject to a condition that Henry Wilson should live in the Drumohill House, and that if he did not do so the farm and all the other gifts conferred on him were to go to his brother James, subject to a further condition that if James did not reside in Drumohill, the farm was to go unconditionally to a nephew, Alexander Wilson. It will be noted that I do not purport to set forth all the contents of the will. I have confined myself to stating in my own language what I think is the effect of so much of it as is relevant to this appeal. I do not know why the testator imposed the condition of residence at Drumohill. It probably was for the sake of his widow, who would otherwise be very lonely; but, whatever was his reason, he evidently intended that within a reasonable time after his own death, the legatee should make it his real place of abode, and keep it as such during his life.

We have very little evidence of what occurred from the death of the testator to the bringing of the action. It consists chiefly of some letters which evidently form only portion of a correspondence, but they contain enough to enable me to come to a conclusion on what was the real issue in the action. Both executors—Henry and James—proved the will, but I gather from the letters that the latter, who is a retired inspector of the London Police, residing in

Essex, left the administration of the assets in the hands of his brother, who, was a merchant living in Enniskillen. Henry entered at once into possession of Drumohill, but he did not fulfil the condition of residence there for some time. This appears by a letter from the testator's widow to James Wilson, dated the 17th October, 1905, in which she says that Henry comes out once a week, and that she is always glad to see him, as she is very lonely. This letter, written in good faith, and showing a most kindly feeling for Henry, satisfies me that he had not then begun to fulfil the condition of residence; but as it is dated only three months after the testator's death, it might be said that a reasonable time for his doing so had not elapsed. The next written information we have on this subject is in a letter from the same lady on the 26th February, 1907. It appears by a letter from James to Henry, dated the 14th of that month, that the former was dissatisfied with the accounts supplied by the latter relating to the administration of the assets; and amongst other matters referred to, he asks to be given a definite date of the time when Henry "put in a *bona fide* residence in Drumohill." I gather that James was doubtful whether there had been theretofore any such residence; and it was probably some inquiries addressed by him to Mrs. Wilson on this subject that led to her letter of the 26th February, in which she says that he comes out every Saturday night and stops till Monday evening, and sometimes comes again on Tuesday evening, and stays till Wednesday evening. Now, if this were true (and there was no reason why James should not believe it), the natural result would be to increase his doubt as to whether there had been any real fulfilment of the condition to reside. Henry, and his son, who was a day pupil in Portora School, had a well-furnished and comfortable house in Enniskillen; and there was a strong temptation for him to continue such house as his home, and to make his residence in Drumohill, which was seven miles distant, merely nominal. This, I think, would be, or at the least might be held to be, a violation of the condition attached to the gift; and I am not surprised that James and his advisers were disposed to take this view, which was strengthened by what followed. The correspondence in evidence was resumed on the 5th September, 1907, when it was conducted by Helder,

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Roberts, & Co., London, solicitors acting on behalf of James. It appears that a release had been sent by Henry for execution by James, who declined to sign it without further information, and the letters that were then written seemed to have resulted therefrom. Objections are taken in these letters by the English solicitors to many defaults on the part of Henry, only one of which relates to Drumohill. About it they say in the first letter—"As regards Drumohill our instructions are that you have not complied with the terms of the will of the testator as you allege you have done, and we shall be glad if you furnish us with the precise date when you entered into *bona fide* residence at that farm." I am unable to understand, except on one assumption, why this reasonable and simple request, although again and again repeated, was never answered. In a letter of the 24th September, 1907, to Henry Wilson, Helder, Roberts, & Co. say that if certain specified information and vouchers are supplied there would be only one matter outstanding—the *bona fide* residence of Henry at Drumohill in accordance with the terms of the will; and they ask again for the precise date of his entering into such residence, with a statutory declaration verifying the same. Henry's reply to this last point was that he had been living there "for a very considerable time," which the solicitors, in a letter of the 2nd October, describe as an evasive answer, and they pointed out that what they required to know was whether he had complied with the condition, namely, whether he had taken up a permanent residence there since the testator's death. They conclude by saying that they were now making a final application for the production of certain vouchers asked for in the previous correspondence—proper evidence of the payment of certain specified legacies, and satisfactory evidence of Henry's permanent residence at Drumohill in compliance with the terms of the will, adding that Henry must take on his own shoulders the responsibility of a refusal of these requests, as their client was determined to obtain this information and, if necessary, would institute proceedings for the purpose of obtaining it, and would endeavour to make Henry responsible for the costs thereof. Henry Wilson replied by a letter of the 5th October, dealing, in my opinion, most unsatisfactorily with all the matters about which information was required, his

reference to Drumohill being: "All I can say is that I imagine I have carried out to the letter that clause of the will. If I did not, your client would seem to see that I did." He adds that James had not returned the release, and that as the onus of paying legatees had devolved on him (Henry), he ought to have it. I have not seen this document; but I presume that its object was to obtain from his co-executor an acknowledgment that the assets had been fully administered, and it was, as I have already suggested, what led to this correspondence. The next letter is from the English solicitors to Mr. Mayne, to whom Henry had requested that all further communications should be addressed. It is dated the 9th October. It repeats the requisitions previously addressed to Mr. Mayne's client. It refers, amongst many other things, to the latter's extraordinary expression, that he "imagines" he has carried out to the letter the terms of the will; and adds that James has documentary evidence (referring, I presume, to Mrs. Wilson's two letters) to the effect that his brother has done nothing of the kind; but that if he has complied therewith, it will be very simple for him to make a statutory declaration to that effect. The letter concludes with a statement that unless they receive satisfactory information, as well as the vouchers, they will advise their client to institute proceedings. Mr. Mayne's reply leaves matters as they were, the only reference to Drumohill being, "my client is satisfied that he has carried out clause 7," followed by an offer to accept service of any document. The last letter is one from Messrs. Helder, Roberts, & Co., to which it is unnecessary to refer; but no litigation was begun, and we have been told that there was no further correspondence between the parties until March, 1910—an interval of seventeen months.

I pause here to consider the inference to be drawn from these documents. I am of opinion that James Wilson was justified by the two letters from his sister-in-law in believing that Henry had not fulfilled the condition of living in Drumohill. If the testator intended, and if the true construction of the will was, that he should make the house in which the widow was given apartments his home, it seems to me that he had not done so by the visits described by her, and that for at least a year and a half after the testator's death his home continued to be the comfortable house in

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Enniskillen. He may have believed that his visits to Drumohill were a fulfilment of the condition; and I have no doubt that probably before his brother's letter of the 14th February, 1907, and certainly before the correspondence of the following September, he told James that he had fulfilled it. But in the circumstances of the case it was a natural and reasonable thing on the part of his brother and the London solicitors to ask him at what date he began to reside, and to verify it by statutory declaration, or some other evidence. The plaintiffs' counsel have argued that the sole object of James Wilson's requisitions was to benefit himself, and that his request for information as to the administration of the estate was only a pretence. I find no evidence of this, and it seems to me to be unlikely. Notwithstanding Mrs. Wilson's two letters, he made no claim to the property; and if in the autumn of 1907 Henry had not gone to live in Drumohill, it seems clear that James had neither attempted nor contemplated doing so. The consequence would have been that long before the autumn of 1907 the farm would have passed to Alexander, the nephew, the gift to whom was free from any condition. I am disposed to think that James feared he might incur some liability as executor if he did not satisfy himself that the assets had been duly administered, and that it was his duty to do so; but that, notwithstanding the threats in his solicitors' letter, litigation was never seriously contemplated by him. At all events, no further steps were taken on either side until after Henry's death, which occurred in October, 1909. It is probable that at some date after February, 1907, Henry's residence in Drumohill became less nominal and more of a reality than the description given of it by Mrs. Wilson's letter written in that month. Mr. Law Smith's opinion was taken on this subject, but I know not at what date, and the document is not now forthcoming. It is probable that what led to his being consulted was Mr. James Wilson's pressing inquiries, as I cannot otherwise account for what I regard as a systematic refusal by Henry and his solicitor to state the time when the former began his residence. They were afraid that if the true date was given, Alexander, the nephew, might contend that it was too late. There is another letter from Mrs. Wilson to James, her brother-in-law, dated the 20th

February, 1910, one passage in which tends to support my view that Henry, before his death, made Drumohill more his residence than he did at the date of her two previous letters, although she says in it that he failed to keep up the place. There is a significant statement in this letter that the nephew, Alexander, had arrived at his own house a few days earlier, and that a letter had come to him from the Land Commission, addressed to Drumohill. This suggests his making a claim to the farm, a suggestion strengthened by the fact that in February, 1911, he refused to admit that Henry Wilson had complied with the conditions. The next matter of importance is a letter from Mr. Mayne to James Wilson, of the 22nd March, 1910. Henry Wilson had never applied to be registered under the Act of 1891 as owner of Drumohill; and his executors, who are said to have been trustees for the sale of the farm, could not sell without assistance from James Wilson, the surviving executor of Alexander, the original testator. In these circumstances, on the 22nd March, 1910, Mr. Mayne wrote to James Wilson as crude and unsatisfactory a letter as I have ever read, bearing in mind the position in which the parties stood when they last interchanged communications a year and a half before. Mr. Mayne, without any explanation, wishes to know if James Wilson, as surviving executor of Alexander Wilson, will sign an assent to the devise of the lands of Drumohill to the late Henry Wilson, or if he will join in a conveyance of the lands to the executors of Henry Wilson, or to such person as the lands may be sold to by them. I confess if I had received this letter after what already happened, I would not have understood what it meant. I am told that the signature of the assent asked for was for the purpose of the Act of 1891, and would not have committed the person signing it to anything. I cannot say at the present moment whether it would or not. What I do know was that there was no explanation of why the signature was required, or any reference to the Act of 1891; and if I, who know something of our Irish legislation, would not have understood the letter, I infer that it would be absolutely unintelligible to a layman, and equally so to his English solicitors. James Wilson naturally assumed that what was required from him was some document amounting to an assurance on his part that Henry Wilson at the

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time of his death was absolutely entitled to Drumohill. Having regard to what had already occurred, he was not prepared to give this assurance, and in my opinion he was quite right. His reply was a refusal to sign any document, giving as a reason that his brother had never complied with the condition of residence, and that Drumohill could not be sold by his executors. He adds that he had been told on good authority that his brother Henry was incapable of making a will. He had been so told by Mrs. Wilson in her letter of the previous month, but as the will had been proved, this was of no importance. The letter, written evidently in the heat of the moment, was not what a well-trained business man would write, but it was not worse than that to which it was a reply. The next step was the issue of the writ in this action.

The writ was not preceded by any letter or other communication stating the intention to issue it, and the relief that would be sought by it. If there had been such a letter, James Wilson could have consulted his solicitors, who I believe would have given him the same advice as they did when they received the writ. The claim was, (1) for a declaration by the Court that Henry Wilson was at the time of his death in possession of and entitled to the farm of Drumohill, devised by Alexander Wilson's will, and that all the conditions imposed thereby on the said devise had been fulfilled; (2) that James Wilson be directed to do all acts necessary to have the plaintiffs registered as owners of the farm in the Local Registry of Title, and to give assent to the said devise to Henry Wilson. James Wilson could not have given a declaration such as that asked for that would be of any value, but if plaintiffs' counsel are right in saying that he could have given without incurring any personal responsibility such an assent as would have enabled the plaintiffs to be registered as owners under the Act of 1891, there was no reason why he should not do so. It must be remembered, however, that this was the first occasion on which either registration as owner, or the Act of 1891, was ever mentioned. On receiving the writ, and before entering an appearance, James Wilson's solicitors wrote to Mr. Mayne a candid and reasonable letter. They say that their client considers that the terms of clause 7 of the will had not been complied with, inasmuch as Henry Wilson did not enter

into *bona fide* residence of the farm in accordance therewith, but that as he did not desire to make any claim thereto or to contest the question as to whether the conditions imposed by the will have been duly performed, he is prepared to do whatever may be necessary, in his capacity as surviving executor, to assent to the devise to Henry Wilson, and for an order being made that the plaintiffs be registered as owners of the farm in the Local Registry of Title, subject, however, to his being paid all his proper costs and expenses. They further say that in these circumstances there is no necessity to proceed further with the action. Mr. Mayne replied on the 25th June that he thought the most convenient way would be for James Wilson to join in the conveyance of the farm to a purchaser, which would enable the plaintiffs to proceed with the sale without further delay, and would enable the purchaser to be registered as owner without further trouble or expense. He added that he thought James Wilson was liable for the costs of the writ and order for service out of the jurisdiction. On the 29th June this letter was answered by the London solicitors, saying that they would, of course, advise Mr. Wilson to join in the conveyance to the purchaser, but that they cannot agree that he should pay the costs of the writ and order for service. I am disposed to think that in consenting that their client should join in the conveyance to the purchaser, the solicitors went further than they ought to have done. The person really interested in the question whether the condition as to residence had been fulfilled was Alexander, the nephew; for if there was a question as to whether Henry had fulfilled it, there was no doubt that James had not, and a conveyance to the purchaser by the surviving executor might have prejudiced his nephew if the gift to him had become operative. I am of opinion, however, that they were right in declining to pay the costs of the writ and the order for service. It was not unreasonable conduct on the part of James, but the evasive and unsatisfactory letters of Henry Wilson and Mr. Mayne, that led to the action; and the plaintiffs having been at once offered everything that James Wilson could give, ought to have paid these costs out of the assets of their testator. If they had done so, the action, at least as far as the then sole defendant was concerned, would have come to an end. Unfortunately

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Mr. Mayne persisted in his demand to be paid the plaintiffs' costs; and the only reason for his proceeding with the action was to enforce costs to which his clients were not entitled.

A statement of claim was delivered in October, 1910, seeking the same relief as was endorsed on the writ; and by an extraordinary oversight, the paragraph which purports to set forth verbatim the devise of Drumohill, omits altogether the gift to Alexander, the nephew. The defence delivered in November, 1910, adheres strictly to the position taken up by Messrs. Helder, Roberts, & Co. in their letter of the 16th June, written before they had entered an appearance. Paragraph 7 is a re-statement of the contents of that letter. The words omitted in the statement of claim from the recital therein of the conditions in the will are supplied. Paragraphs 3 and 5 state most temperately the defendant's case as to the condition of residence. They say that Henry Wilson went into possession of the farm shortly after the death of the testator, with the assent of the defendant, his co-executor, and continued in possession up to his death: that when he thus went into possession he was carrying on business in Enniskillen, where he resided; that the defendant believes that he did not during his lifetime discontinue such business, or give up his residence in Enniskillen, but that he merely resided from time to time on the farm where he supervised the farming operations; that the plaintiffs—a mistake for the plaintiffs' testator—had always refused to furnish the defendant with any particulars or proofs of his residence on the farm, or of the due performance by him of the conditions mentioned in the will; and that the defendant accordingly refers to such proofs as the plaintiffs may produce at the hearing of the action of the due performance of the said conditions; adding that he will submit that it is not incumbent on him, as executor of Alexander Wilson, to determine, and that he has no power to declare, how far the conditions have been performed. The most important paragraph relating to the real question then in controversy is the last, which submits that in any declaration which the Court may make, the defendant's costs of the action should be provided for. After this pleading, following the letter of the 16th June, it is evident that the sole

object of the plaintiffs in continuing the action was to obtain judgment against the defendant to pay the costs thereof; and the defence was prepared to carry out instructions that the defendant claimed no personal interest in the farm nor desire to contest the question whether the conditions imposed by the will had been duly performed. Both parties understood that the hostile litigation related only to the costs. There was no discovery, nor interrogatories; and the plaintiffs' evidence was of a perfunctory character. The defendant subpœnaed Mrs. Wilson to show that he had reason to believe that the conditions had not been fulfilled, or at the least that this was a doubtful matter; but when she was unable to attend he did not seek to examine her on commission, but offered her letters, not in proof of the facts stated therein, but as evidence of the defendant's good faith. We are of opinion that they were admissible for this purpose, and, although rejected by the Master of the Rolls, they were received in this Court.

The plaintiffs' attention having been called to the strange omission of any reference to the nephew in the statement of claim, they made him a party to the suit by amendment in January, 1911, and served a new statement of claim in the next month, alleging that Alexander Wilson had refused to admit that Henry Wilson had complied with the conditions; but Alexander did not appear to support such case.

Now, if I have correctly stated the facts and drawn a reasonable inference therefrom, it would be difficult to see on what grounds James Wilson was ordered to pay the costs of the plaintiffs. We were given, however, in the course of the argument, a copy of the judgment of the Master of the Rolls, in which he states distinctly his *ratio decidendi*:—"He has put the plaintiffs to the expense of this trial wantonly and with his eyes open. The residence of Henry Wilson on the farm was a residence in reality, in substance, and not a technical residence. In my opinion the defendant knew that there was no foundation for the allegation that the condition of residence had not been fulfilled." If I agreed with this last sentence, I should also agree with the judgment as to costs. But I cannot accept the statement. Whether the condition was fulfilled or not is a mixed question of

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law and fact. The meaning of the condition was that the legatee was to make Drumohill house his residence in reality and substance within a reasonable time after the testator's death, and continue it as such during his life. I have tried to show that James Wilson had ample grounds for believing that his brother had not done so, and I cannot hold that he believed what, if I had been in his position, I would not have believed myself. The Master of the Rolls seems to have been strongly impressed with a statement in the letter dated the 23rd October, 1907, of the London solicitors, to Mr. Mayne—"Your client is well aware (and so are you) that he has not complied with clause 7 of the will." He thinks that "this throws a lurid light on the conduct of the case." I agree that Mr. Mayne's knowledge ought not to have been referred to; but as far as the defendant (who probably never saw the letter) is concerned, it is of no importance. I am of opinion that so far from the defendant being ordered to pay the costs, he is entitled to his costs of the action.

It may be that the plaintiffs would be entitled to pay those costs, as well as their own, out of the estate of the testator. In fairness to them, I ought to point out that the result of the action, as amended, has been of advantage to that estate by clearing their title from all shadow of doubt, and by enabling them to offer for sale a property to which they have been declared by the judgment of a competent Court to have an undoubted right. If prospective purchasers of farms in Florence Court resemble those in other parts of Ulster, this would have the effect of increasing the purchase-money offered.

CHERRY, L.J.:—

Although I am unable to concur in the judgments which have been delivered by the other members of the Court, it will not be necessary for me to take up very much time in stating my reasons for holding that the order of the Master of the Rolls as to costs ought not to be disturbed by this Court. I have read the entire correspondence and the notes of the evidence, and the conclusion I have come to is that a more unmeritorious litigant than the defendant in this case never came before a Court of Justice. I agree

with every word which the Master of the Rolls, who heard and saw all the witnesses, has said regarding him.

The defendant is, however, sued as executor of his brother's will by persons claiming under the will, and he is, of course, by reason of this fact *prima facie* entitled to his costs out of the trust fund. The costs of trustees and executors cannot be said to be within the discretion of the Court. They can only be refused to them by reason of such inequitable conduct on their part as amounts to a violation or culpable neglect of their duty in regard to the trusts. This rule applies to costs of litigation as well as to other costs. If a trustee is guilty of impropriety or misconduct as such, he may not only be deprived of the right to get his costs, but he may be ordered to pay the costs of other parties which have been occasioned by his improper conduct. Has then the defendant James Wilson acted in such a way as not only to deprive himself of his right to receive costs, but also to make him liable to pay the plaintiffs' costs? I think he has. Two letters, viz., one written by Mr. Mayne to him on the 22nd March, 1910, and his reply of the 23rd March, 1910, in my opinion conclusively establish that the necessity for this action arose entirely from his conduct; partly by reason of his improper refusal to discharge his duties as executor, and partly by his putting forward an unfounded claim to his brother's farm—a claim which, when the action was commenced, and he was confronted with the necessity of proving it by legal evidence in a Court of law, he immediately withdrew. The letters are as follows:—[His Lordship read the letters referred to, the contents of which are set out *ante*, pp. 473, 474.]

Now, in my opinion it was the plain duty of James Wilson, as executor of his brother Alexander, to sign the assent to the devise of the lands of Drumohill to his brother Henry A. Wilson; yet he refused to do so, and refused in most insulting terms. He now denies that he was putting forward, by that letter, a claim to the farm for himself; but to my mind it is as plain as daylight, reading that letter in conjunction with that of 20th February, 1910, from the widow of Alexander Wilson to him, that he was; and that this claim, based upon the alleged non-compliance of his deceased brother with the condition as to residence, was the reason, and the only reason, why he refused to give his assent to the

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devise. It was a bad reason in point of law. The assent to the devise had nothing to do with compliance with the condition as to residence, for the simple reason that the devisee (this land being subject to the provisions of the Local Registration of Title Act, 1891) could not take up his residence on the farm until the executors had assented to the devise. Once the debts and legacies were all paid, the executor was bound to assent, and as a matter of fact he did assent, for he allowed his brother to occupy the farm during his life. What justification therefore, was there for his refusal to sign the written assent which was necessary for the purposes of the 87th section of the Local Registration of Title Act? It is said that he was not aware of the object of a written assent. But could he not have asked, if he desired to know? And if, as he now says, he was making no claim to the farm himself, what did it matter to him for what purpose the written assent was required? The dishonesty of his conduct is proved by the fact that a few months later, *when no change had taken place in the circumstances, except the issue of a writ*, he took up an entirely different attitude, repudiating any desire to contest the question as to whether the conditions imposed by the will had been duly performed or not, and stating his willingness to do "whatever may be necessary in his capacity as surviving executor of the will of Alexander Wilson, to assent to the devise to the late Henry A. Wilson." (I quote from the letter of his solicitors dated the 16th of June, 1910.) The service of a writ has a wonderful effect on the mental attitude of persons like the defendant in this action.

But it was then too late. This action had been begun, and the solicitor for the plaintiffs very naturally refused to discontinue it unless the defendant agreed to pay the costs, which he refused to do.

If I am right in holding that it was the duty of the defendant as executor to sign a written assent to the devise of the farm to his late brother, and that his refusal to do so was the sole cause why this action was necessary, the case comes exactly within the authority of two decisions of great weight in this country which have here been cited to us by Mr. Wilson. The first of these was a decision of the late Sir Edward Sullivan when

Master of the Rolls: *De Burgh* v. *M'Clintock* (1). In that case a legatee, immediately upon attaining age, claimed payment of a legacy to which she became absolutely entitled. The trustees of the will, apparently acting with most perfect *bona fides*, required that they, or one of them, should have a personal interview with the legatee for the purpose of explaining her rights and guarding her against the influence of her mother and stepfather, with whom she was residing; and they proposed, unless such interview was granted, to pay the legacy into Court. The legatee brought an action against the trustees to recover the legacy, and it was held that as the trustees were not justified in withholding or delaying payment of the legacy, they should pay the entire costs of the action.

The other case relied upon by the plaintiffs, *Coppinger* v. *Shekleton* (2), is a decision of Chatterton, V.-C. There it was held that a surviving trustee, who declined to transfer trust funds to new trustees duly appointed under a power of appointment by one of the beneficiaries under a will, should pay the costs of the action which was rendered necessary by his refusal. No misconduct in the ordinary sense of the word was alleged against the trustee. It appeared that he doubted the validity of the appointment, and did not consider the new trustees fit persons to act as such. The learned Vice-Chancellor merely found that he "showed an unreasonable caution," and that as the entire costs were incurred by reason of his refusal, for whatever cause, to discharge his duty, he should not only be deprived of his right to receive costs, but also ordered to pay those of the plaintiffs.

In my opinion the claim of the plaintiffs in the present case to be paid their costs by the trustee is a much stronger one than it was in either of the cases I have cited. I think the entire costs of this action, as I have said, were incurred by reason of the defendant's unreasonable refusal to discharge his duties as executor, and his unfounded claim to his late brother's farm. I think, therefore, that the Master of the Rolls was amply justified in ordering him to pay the costs of the action.

Solicitor for the plaintiffs: *T. J. Mayne.*

Solicitors for the defendant James Wilson: *Hayes & Sons.*

R. ST. J. C.

(1) 11 L. R. Ir. 220. (2) 15 L. R. Ir. 461.

Barton, J.
1913.
Feb. 17.

In re THE BANK OF EGYPT, Limited.

Company—Defaulting Irish Contributories of Company wound up by English Court—Enforcement of English Order giving official liquidator leave to make a call—Companies (Consolidation) Act, 1903 (8 *Edw.* 7, *c.* 69), *s.* 180, *sub-s.* 1—*Practice.*

A company, registered in England, was being wound up by the English Court, and an order had been made giving the Official Receiver and Liquidator leave to make a call upon the contributories of the Company. Certain Irish contributories had failed to pay the amount of the call.

On an *ex parte* application, leave was given to the Official Receiver and Liquidator to enforce the order of the English Court by issuing and serving on the defaulting Irish contributories an originating summons requiring them to pay the amounts in which they were respectively in default.

Ex parte Application.

This was an application on behalf of the Official Receiver and Liquidator for liberty to enforce an order of the English Court, which gave him leave to make a call on the contributories of the company, by issuing and serving on certain contributories resident in Ireland an originating summons for an order requiring them to pay the respective amounts (with interest) in which they were in default on foot of the said call.

The material facts were as follows:—

The Bank of Egypt, Limited, was a company registered in England, and by an order of the Chancery Division of the High Court of Justice in England, dated the 17th October, 1911, the company was ordered to be wound up. By a further order of the said Court, dated the 14th of May, 1912, leave was given to the Official Receiver and Liquidator of the company to make a call of £12 10s. per share on all the contributories of the company, payable in three instalments, the last of which was to become due on the 30th September, 1912. Several contributories who were resident in Ireland failed to pay the amount due by them on

foot of the call, and accordingly the Official Receiver and Liquidator made the present application.

Gustavus Hamilton for the Official Receiver and Liquidator:—

It is provided by sect. 180, sub-sect. 1, of the Companies (Consolidation) Act, 1908, that any order made by the Court in England in the winding up of a company, shall be enforced in Ireland "in the same manner in all respects" as if the order had been made by the Court here. The meaning of that section is that this Court is to treat the order of the English Court, which gives the Official Receiver and Liquidator leave to make the call, in the same manner as if it had been made by this Court; and therefore the Official Receiver and Liquidator is entitled to commence his proceedings here at the point at which the proceedings in the English Court have arrived. Order LXXIV, Rule 109, of the Rules of the Supreme Court (Ireland), 1909, provides that any application to procure the enforcement of any order made by the Court in England in the course of the winding up of a company may be made by motion *ex parte*.

The Court made the order sought.

[When the originating summons came on for hearing on April 28th, 1913, there was no appearance on behalf of the defaulting contributories.]

Solicitors for the Official Receiver and Liquidator: *Hamilton and Craig.*

R. W. L.

Barton, J. 1913. July 14.

IN RE MURPHY, DECEASED; PRENDERGAST *v.* MURPHY.

Lunatic—Arrears of maintenance—Whether debt, or charge on personal estate—Statute of Limitations—Common Law Procedure Act Ireland), 1853 (16 & 17 *Vict. c.* 113), *sect.* 20—*Lunatic Asylums* (*Ireland*) *Act*, 1875 (38 & 39 *Vict. c.* 67), *s.* 16.

Arrears of maintenance of a lunatic in an asylum are an ordinary debt of the lunatic, to which the Statute of Limitations applies.

Re O'Grady's Estate; *O'Grady* v. *Young* (15 Ir. L. T. R. 45) not applied.

MEMORANDUM, by the Chief Clerk for the opinion of the Court in a suit brought for the administration of the estate of Jane Murphy, deceased.

Jane Murphy, a person of unsound mind, not so found by inquisition, was received into the Cork District Lunatic Asylum, on August 8th, 1888, and remained an inmate of the asylum until her death, on September 9th, 1910. At the time of the admission of the deceased, neither the Committee of Management of the Asylum nor the Resident Medical Superintendent had any knowledge of the means or circumstances of the deceased, but from the date of her admission until April 1910, the sum of £9 per annum was paid for her maintenance by her sister, Mrs. Wickstead, until the death of the latter, in July, 1909. After Mrs. Wickstead's death her personal representative continued to pay the £9 per annum until April 1910, when an order was made by the Lord Chancellor declaring Jane Murphy of unsound mind; and the Registrar in Lunacy directed that thenceforward the maintenance of the deceased should be paid for at the rate of £26 per annum.

After the death of Jane Murphy, her estate realized a considerable sum, and the Committee of the Asylum made a claim against her assets for the sum of £361, being the balance of arrears of maintenance due to them, calculated at the rate of £26 per annum, after giving credit for all sums received by them in respect of such maintenance.

The opinion of the Court was requested on the following point:—whether, notwithstanding the ruling of the Chief Clerk that the claim of the Cork District Lunatic Asylum should only be allowed at the sum of £93 10*s.*, being five and a half years at £17 (the difference between £26 and £9) per annum, the said claim should not be allowed in full, namely, £361.

Conner, K.C., for the Cork District Lunatic Asylum.

This is a charge on the personal estate of the lunatic, and therefore all arrears are recoverable, as there is no Statute of Limitations, either directly or by analogy, applicable to a charge on personal estate: *Re O'Grady's Estate*; *O'Grady* v. *Young* (1) *Re Stucley*; *Stucley* v. *Kekewich* (2).

Norwood, K.C., for the plaintiff:—

Under sect. 104 of the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), which corresponds to sect. 16 of the Lunatic Asylums (Ireland) Act, 1875, the guardians or committee of management can only recover six years' arrears of maintenance, less the payments made during that period): *In re Newbegins' Estate* (3); followed in *In re Watson*; *Stamford Union* v. *Bartlett* (4). In *In re Gibson* (5), the case which the Vice-Chancellor seems to have followed in *O'Grady's Estate* (1), the person who was making the claim for arrears of maintenance was seeking to exercise a right of retainer. In *Re Harris* (6) it was decided that a claim for the past maintenance of a lunatic is simply a debt of the lunatic, and therefore more than six years' arrears will not be paid. See also *In re Weaver* (7). In *Wandsworth Union* v. *Worthington* (8), there had been a payment which took the case out of the statute. In *Re Taylor*; *Edmonton Union* v. *Deely* (9), the balance of arrears of maintenance was held to be a legal debt of the lunatic.

(1) 15 Ir. L. T. R. 45.
(2) [1906],1 Ch. 67.
(3) 36 Ch. D. 477, at p. 484.
(4) [1899] 1 Ch. 72.
(5) 7 Ch. App. 52.
(6) 49 L. J. Ch. 327.
(7) 21 Ch. D. 615.
(8) [1906] 1 K. B. 420.
(9) [1901] 1 Ch. 480.

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BARTON, J.:—

These arrears of maintenance constituted, in my opinion, a legal debt, to which the Statute of Limitations is applicable. In *In re O'Grady's Estate* (1), the Vice-Chancellor came to the conclusion that the advances for maintenance were made under circumstances which created a charge upon the lunatic's estate. The report of the case is a meagre one, and there may have been facts in that case which the report does not disclose. There are no grounds, in the present case, for holding that the arrears of maintenance constituted a charge. In view of the decision in *In re O'Grady's Estate* (1), the matter was a proper one to bring before the Court, and there will be no order for costs against the Committee of the Asylum.

Solicitors for the plaintiff: *J. C. and A. Blake.*

Solicitor for the Cork District Lunatic Asylum: *J. J. FitzGerald.*

R. W. L.

Ross, J.
1913.
June 25, 26.

IN THE MATTER OF THE ESTATE OF CHARLES AMBROSE, OWNER; EDWARD A. HARNEY AND ANOTHER, PETITIONERS.

Mortgage—Transfer—Transferee for value without notice—Negligence of mortgagor—Fraud of mortgagee—Equities as between mortgagor and transferee—Two innocent parties—Which must suffer from fraud of third party?—Estoppel.

A., a solicitor, in the year 1897, mortgaged certain property to P., to secure a sum of £600. In the year 1905 P. advanced a further sum of £317 to A., and a new mortgage was executed, for the sum of £917, of the lands subject to the mortgage of 1897 and additional lands. This mortgage contained no reference to the mortgage of 1897, nor was the deed effecting that mortgage handed over to A., it being alleged by P. to have been lost. In 1907 P. transferred the 1905 mortgage to himself and H. as joint trustees of a trust fund, by way of sub-mortgage to secure a sum of £1500, the circumstances being such as to constitute P. and H. transferees for value. The principal sum of £917 was then due on foot of the mortgage of 1905, and H. had no notice of the mortgage of 1897. A. acted as P.'s solicitor in connexion

(1) 15 Ir. L. T. R. 45.

with the transfer, and approved of the transfer deed. In 1908, P. transferred the mortgage of 1897 to a bank, which subsequently realized the amount. The sub-mortgage of 1907 was afterwards transferred to H. and M., as the then trustees of the trust fund, and they instituted the present proceedings for a sale of the lands comprised in the mortgage of 1905, alleging that the sum of £917 was due on foot of such mortgage. A. claimed to be entitled to credit in respect of the moneys realized on foot of the mortgage of 1897.

Held, that in consequence of A. having left the mortgage of 1897 outstanding in the hands of P., it was not open to A. to say that the whole amount secured by the mortgage of 1905 was not due.

MOTION by petitioners to make conditional order for sale absolute, notwithstanding cause shown.

On 17th December, 1897, Charles Ambrose conveyed to William Pope portion of the lands of Sporthouse, containing 32A. 0R. 26P., held by him on lease, and also another portion of the same lands, containing 45A. 3R. 18P., held by him as tenant-purchaser from, and subject to the payment of an annuity to, the Irish Land Commission, by way of mortgage to secure a sum of £600; and the said mortgage was duly registered in the Registry of Deeds Office on the 24th December, 1897.

The holding of 45A. 3R. 18P. having in the year 1903 been sold by the Land Commission by reason of the tenant-purchaser failing to pay the purchase annuity, and the only security remaining subject to the mortgage being the 32 acres portion, William Pope, in the year 1905, demanded additional security; whereupon Charles Ambrose on the 7th November, 1905, executed a mortgage in favour of William Pope of the lands of Tinvancoosh, county Kilkenny, part of the lands of Sporthouse, county Waterford, and certain house property in the city of Waterford, to secure the sum of £917 10*s.* 5*d.*, with interest at 5 per cent., made up of the said sum of £600, and the further sum of £317 10*s.* 5*d.*, advanced by Pope to Ambrose. The old mortgage for £600 was not got up by Ambrose or recited in the new mortgage, as Ambrose believed it to be unregistered, and Pope alleged that it had been lost or mislaid.

On the 21st June, 1907, Pope assigned by deed to himself and to Edward A. Harney, one of the petitioners, the mortgage for £917 10*s.* 5*d.* by way of sub-mortgage to secure the sum of

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£1500 and interest. The transfer was made to Pope and Harney as trustees of a trust fund under circumstances which constituted them transferees for value of the mortgage. The principal sum of £917 10*s.* 5*d.* was then due on foot of the mortgage of 1905, and Harney had no notice of the mortgage of 1897. Ambrose acted as solicitor for Pope in the matter of the transfer, and as solicitor approved of the draft, witnessed the execution of the deed by Pope, and subsequently acted in having it registered in the Registry of Deeds. On April 2nd, 1912, the mortgage debt of £1500, and the securities for same, were transferred by Pope and E. A. Harney to E. A. Harney and G. T. Mullally, the petitioners, Mullally having been appointed a new trustee of the trust fund in place of Pope.

On the 12th February, 1908, Pope assigned to the Munster and Leinster Bank the sum of £600, and all arrears of interest due thereon, and the benefit of all securities for the same, under and by virtue of the mortgage of 17th December, 1897, and the lands of Sporthouse comprised therein. The Munster and Leinster Bank subsequently instituted proceedings before the Master of the Rolls, wherein it was declared that the said sum of £600 and interest was well charged on the 32A. 0R. 26P. of the lands of Sporthouse, which were ordered to be sold.

The petitioners brought the present petition for sale, alleging that the said sum of £917 10*s.* 5*d.*, and interest, was due on foot of the mortgage of 7th November, 1905, and that the said sum of £1500, and interest, was due on foot of the sub-mortgage of 21st June, 1907. A conditional order for sale of the lands comprised in the 1905 mortgage was made on 7th March, 1913. Charles Ambrose showed cause against the order being made absolute.

Brunskill, for the petitioners:—

Serjeant Matheson, K.C., for the owner:—

The assignment of 1907, from Pope to Pope and Harney, is subject to all the equities affecting Pope: Ashburner on Mortgages, p. 441; *Rochfort* v. *Cox* (1). Pope had two covenants to pay the sum of £600. Pope could not recover two sums of £600,

(1) 17 Ch. D. 520.

and Pope's assignees are in no better position. There can be only one debt for the £600. If the Munster and Leinster Bank have it, then the petitioners cannot also have it. Ambrose had no duty to Harney; he was not solicitor to Harney.

Brunskill, in reply :—

Harney was guilty of no negligence. Ambrose was negligent on two occasions—in 1905 in not getting up the old mortgage, or having a recital of the old mortgage in the new mortgage, and in 1907, when having full notice of the transfer, and having approved of it, and registered it, he left in Pope's hands the old mortgage, which Pope in 1908 assigned to the Bank. No doubt, a transferee of a mortgage, where the mortgagor is not a party to the transfer, can only claim the amount actually due by the mortgagor, but here at the time of the assignment the full amount, £917, was due, and nothing that happened afterwards by reason of the negligence of Ambrose enabling Pope to create a second debt to the Bank, could alter the assignee's rights: *Earl of Aldborough* v. *Trye* (1). A transferee, without notice of equitable grounds which render the security impeachable, has against the mortgagor the better equity, and is entitled to what is due to him under his security: *Nant-Y-Glo and Blaina Ironworks Company* v. *Tamplin* (2). Knowledge of one trustee does not bind the other co-trustee: *Taylor* v. *London and County Banking Company* (3); *Taylor* v. *Blakelock* (4). Harney is a purchaser for value without notice. By obtaining the transfer from Pope he gave up a right of action against Pope: *Thorndike* v. *Hunt* (5).

Ross, J. :—

The case is one of very considerable importance to the parties, but the clear manner in which counsel have presented the matter enables me to dispose of it at once.

The facts are few and simple. Mr. Ambrose, a Waterford

(1) 7 Cl. & F. 436.
(2) 35 L. T. R. 125.
(3) [1901] 2 Ch. 231.
(4) 32 Ch. D. 560.
(5) 28 L. J. Ch. 417.

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solicitor, in 1897 mortgaged certain property to Mr. Pope, to secure a sum of £600. Some of the property, the security for the mortgage, disappeared. In consequence, Pope, in 1905, called on Ambrose for additional security. Additional security was given and additional money was advanced, increasing the mortgage debt to £917 10*s.* 5*d.* At the time of the second mortgage it was alleged that the first mortgage was lost. The mortgage of 1905 made no allusion to the mortgage of 1897, such as would have put a transferee on his guard. In 1907, Pope transferred the second mortgage to himself and Harney as joint trustees of a trust fund. At a later period the first mortgage was lodged in the Munster and Leinster Bank by way of security for advances. The Bank proceeded to realize it in the Court of the Master of the Rolls. Each of the parties, Ambrose and Harney, is an innocent party. Which is to suffer? Ambrose knew and approved of the transfer to Harney. In the balance of equities, who has the better equity? Serjeant Matheson contends that Ambrose was guilty of no negligence to Pope, and, therefore, of none to Harney. I cannot agree. The mortgagor must take into consideration not only the person with whom he is dealing, but he must have regard to the possibility of some future transfer. Therefore there ought to have been in the new mortgage a recital of the mortgage, or the old mortgage should have been got up. There was no such recital, and the mortgage was not got up. In 1907 Harney, a trustee with Pope for the objects of a trust, gets in the entire security. He has the whole of the lands as a security for the whole debt. Ambrose, who was aware of the transfer to Harney, and approved of the transfer deed on behalf of Pope, does not inform Harney in any way of the earlier mortgage. In the following year, through a fraud on the part of Pope, the old mortgage gets into the hands of the bank. Every assignment is taken subject to all equities. Therefore, in the ordinary case, if the mortgagor did not join, the assignment would only be a security for the amount actually due by the mortgagor. At the time of the transfer the transferees get the whole debt subject to equities; but in the next year the old mortgage is put in force, and three-fourths of the security is snatched away from Harney, who was guilty of no negligence.

I am clearly of opinion that, in consequence of his leaving the old mortgage outstanding in the hands of Pope, it is not open now to Ambrose to say that the whole amount is not due. I therefore disallow the cause shown, and make the conditional order absolute, with costs to be paid to the petitioners in the matter.

Solicitors for the petitioners: *I. Thornton & Son.*
Solicitors for the owner: *Collis & Ward.*

D. M. S.

M. R.
1912.

Nov. 6.
Dec. 11.

THE NATIONAL BANK, Limited, *v.* PATRICK BEHAN and OTHERS.

Voluntary conveyance of lands—Trusts for infants—Subsequent purchaser for value—Onus of proving voluntary conveyance made bona fide—10 *Ch.* 1 (*Ir.*), *Sess.* 2, *c.* 3, *s.* 1—*Voluntary Conveyances Act*, 1893 (56 & 57 *Vict. c.* 21), *s.* 2—*Conveyance with intent to defraud creditors—Nature of fraud required to be proved—Onus of proof*—10 *Ch.* 1 (*Ir.*), *Sess.* 2, *c.* 3, *s.* 10.

Where a voluntary conveyance of lands is impeached by a subsequent purchaser for value, the onus of proving that such conveyance was made *bona fide* and without fraudulent intent, so as to bring it within the protection of sect. 2 of the Voluntary Conveyances Act, 1893, lies on the party seeking to uphold such voluntary conveyance.

Where infants were unable to prove affirmatively the *bona fides* of a voluntary conveyance of lands executed in their favour by their father, the conveyance was held void as against a subsequent purchaser for value.

To bring a deed within s. 10 of 10 Ch. 1 (Ir.), Sess. 2, c. 3, as being made with intent to defraud creditors, the deed must be fraudulent in its execution or execution. A subsequent fraudulent dealing with the property comprised in the deed cannot avoid it. The onus of proof is cast on the party impeaching the deed.

The following statement of the facts is taken from the judgment of the Master of the Rolls:—

In or about the year 1896 the defendants Patrick Behan and Anna Behan got married. They lived in the town of Galway. Patrick Behan was a commission agent, and appears to have had little or no property. Anna Behan got a fortune of some £900, which she handed over to her husband. There were two children of the marriage—the infant defendants, Ethel Behan and Albert Behan.

A portion of the wife's fortune was invested by the husband in the purchase of leasehold interests in—(1) a public-house; (2) a dwelling-house; and (3) two cabins and a house, all situated in the town of Galway. These purchases were made by the husband in his own name, and the conveyances were made to himself.

On the 20th November, 1902, the husband executed a conveyance by which he assigned these several leasehold interests to his wife for her life, and after her death unto and to the use of the children.

The conveyance contains a recital that the husband had agreed to assign his estate and interest in the premises for the considerations and subject to the covenants thereinafter contained.

The consideration was expressed to be £600 cash advanced by the wife to the husband on their marriage, and natural love and affection.

About three months after the execution of the conveyance the husband went into the office of the National Bank in Galway, and induced the manager to advance to him a sum of £436 16*s.* 10*d.*, depositing with him the title-deeds of the premises which had previously been conveyed by the voluntary settlement, as a security for the advance then made and future advances, which now amount with interest to over £700. The execution of the voluntary settlement (which had not then been registered) was suppressed by the husband, and the evidence showed that the wife was a party to the suppression.

The present action was brought for the purpose of having the conveyance of the 20th November, 1902, declared void as against the plaintiffs.

Herbert Wilson, K.C., and *Swayne*, for the plaintiffs:—

The recitals in the deed are inconsistent with a trust for the wife. It creates no equity against a party that he takes no further security than an equitable deposit: *In re Burke's Estate* (1). Priority of time is the last element to be considered. [O'Connor, M.R.—This is not a contest between two equities, but between a legal estate and an equity.] The child is affected by the negligence of the trustee: *Bobbett's Estate* (2).

James O'Connor, K.C., and *Alfred Coffey*, for the infant defendants:—

The principle of *Bobbett's Estate* (2) does not apply. There is no evidence that the mother acted as trustee for the children.

(1) 9 L. R. Ir. 24. (2) [1904] 1 I. R. 461.

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The children are incapable of negligence so as to deprive them of priority. The mother cannot pawn the property of the children so as to secure a title to the pawnee, without express authority under the instrument creating the trust. This property came from her originally, and was substantially her own property. The *bona fides* of the deed is shown by the fact that it dealt with property over which the wife had a substantial claim. The parties were solvent at the time, though solvency or insolvency is not a conclusive test.

S. L. Brown, K.C., for the defendant Anna Behan.

Cur. adv. vult.

Dec. 11.

O'CONNOR, M.R.:—

This is an action brought for the purpose of having a certain voluntary settlement of lands declared null and void as against the plaintiffs, who are equitable mortgagees, on the ground that the settlement was executed for the purpose of defeating the creditors of the settlor.

[His Lordship then referred to the facts as to the execution of the conveyance of the 20th November, 1902, as set out above.]

It was not contended that there was valuable consideration for this conveyance. There was, in fact, no legal debt due to the wife by the husband, and I think that the mention of £[illegible] was only intended to express the fact that the husband got money which had been the wife's property. I will treat the conveyance as voluntary.

There is absolutely no evidence that at the date of the execution of the conveyance the husband was insolvent, or even indebted. In fact the only evidence we have of his financial position at the time is that he had a current account at the Galway Branch of the National Bank and had there a balance to his credit of £72 7*s.* 6*d.*, which was subsequently increased to £107 12*s.* 7*d.*

Now there is nothing whatever in the voluntary settlement which in the least degree suggests a fraudulent intent. The transaction seems an eminently proper one. The husband had appropriated his wife's money. He had bought property with it. She had a very strong moral claim to have the property settled so as to make a provision for herself and her children. In making

the provision he did, he acted as any highly honourable man might do.

But the circumstances which have occasioned this action are of a later date, and are certainly of a fraudulent character. The real question to be decided on the case made by the plaintiff is whether the fraud, subsequently perpetrated, so reflects back on the previous voluntary deed as to prove that it was in fact fraudulent. [His Lordship then referred to the facts as to the equitable deposit with the bank as stated above.]

On these facts there is undoubtedly a personal equity against the wife which prevents her from making any claim under the settlement in derogation of the Bank's mortgage. So far the case is clear. But the National Bank claims that the voluntary settlement is in its entirety void as against it, and that not merely the estate of the wife, but also the estates of the children, must be postponed to it, on the ground that the settlement was executed for the purpose of defeating the creditors of the husband, and therefore void under the Irish Statute, 10 Chas. I, Sess. 2, c. 3, s. 10, which is the equivalent of the 13th Eliz., c. 5.

This brings me then to a consideration of the evidence given in support of the charge that the settlement was executed with a fraudulent intent.

Beyond what I have already mentioned we have no evidence connected with the execution of the deed, except that it was prepared in the office of Mr. Conroy, a solicitor practising in Galway, and now deceased. But we have evidence as to important matters which occurred about two months subsequently. Matthew J. Madden, who was a clerk in the employment of Mr. Conroy from 1896 to 1908, was examined on commission immediately previous to his departure for Australia, and deposed that on the 5th February, 1903, the defendants, Patrick and Anna Behan, came to Mr. Conroy's office and asked for the title-deeds of the property included in the settlement; that Mr. Conroy, in their presence and on their instructions, dictated to the deponent a document which was intended to be an acknowledgment that Mr. Conroy had left with the defendants at their residence the documents of title relating to the settled property as set out at the foot thereof; that this document, as originally drafted, was framed so as to be a direction to lodge the deeds with the National Bank, but was

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subsequently altered into the acknowledgment aforesaid, as the document (which was exhibited) shows; that the document was not signed on that day because the list of documents to be appended to it had not then been made out, but that the list was subsequently added, and the document signed by the defendants, Patrick and Anna Behan, and the title-deeds were afterwards left at their house as arranged. The deponent further proves that on the 7th February, 1903, the defendant Anna Behan, when she came to the office to sign the document already mentioned, signed a further document declaring that she did not require Mr. Conroy to register the settlement, this declaration being required by the deponent as a protection to Mr. Conroy, because the defendant Anna Behan requested that the settlement should not be registered.

As soon as these documents were executed, the deeds were brought to the defendants' house; and in a very short time after the loan from the Bank was effected on the security of the deeds.

I have no hesitation in finding on this evidence that both husband and wife in the month of February, 1903, had conceived the fraudulent design of getting a loan from the Bank by suppressing the voluntary settlement; but it by no means follows that they had conceived any such fraudulent design in the month of November previously. Of course there is good ground for suspicion, but there must be more than suspicion—there must be actual proof of pre-existing fraud, or of facts from which fraud is a necessary inference. For all that appears, the fraudulent design may not have been conceived until the deed had been executed for some time. Between the 20th November, 1902, and the 5th February, 1903, something may have occurred which was the occasion of the fraud not previously thought of. As I understand the law, it is necessary in order to bring a deed within the statute 13 Eliz., c. 5, or the corresponding Irish enactment, 10 Chas. I, Sess. 2, c. 3, s. 10, that the deed must be fraudulent in its conception or execution. A subsequent fraudulent dealing with the property comprised in it cannot avoid it. The whole onus of proof is cast on the person impeaching the deed. I do not think that the onus under this statute has been discharged in the present case, and I am all the more unwilling to draw an inference of fraud in view of the fact that the solicitor's clerk, Madden,

who was in the office at the time the deed was executed, was not asked a single question as to what occurred at the instructions for, or the preparation or execution of, the deed. This was the important time to which to direct the evidence, and it was left untouched.

I should therefore feel obliged to dismiss this action as against the infant defendants if it could only be supported on the ground put forward in the statement of claim and argued at the Bar, viz., that the settlement was executed for the purpose of defeating the creditors of the defendant Patrick Behan; but I think that I should be doing an injustice to the plaintiff if I did not take a wider view of the case.

Although I think that the case was not, from lack of evidence, brought within the section of the Irish Act which is equivalent to the 13 Elizabeth, cap. 5, it does come within the 1st sect. of the Irish Act, which is the equivalent of the 27th Elizabeth, cap. 4, which, as interpreted, makes void all voluntary conveyances against subsequent purchasers for value. The plaintiff, by virtue of the equitable mortgage, was a purchaser for valuable consideration, and as such is entitled to avoid the voluntary settlement unless the latter is protected by the Voluntary Conveyances Act, 1893. This Act enacted that no voluntary conveyance, if in fact made *bona fide* and without any fraudulent intent, should thereafter be deemed fraudulent or covinous within the meaning of the Act 10 Chas. 1, Sess. 2, c. 3, by reason of any subsequent purchase for value. It was for the defendants to bring themselves under the protection of the Voluntary Conveyances Act, 1893, just as it was for the plaintiff to bring the voluntary deed within the 10th sect. of 10 Chas. I, Sess. 2, c. 3. The onus is shifted from the plaintiff to the defendant, and as I should have felt obliged to dismiss the action under the 10th section because the plaintiff failed in proof of fraud, so now I feel bound to give judgment against the infant defendants because they failed to prove affirmatively the *bona fides* of the voluntary settlement.

I think that there can be no doubt as to the onus of proof under the Voluntary Conveyances Act, 1893. Up to the passing of that Act all voluntary conveyances according to well-settled law were deemed to be fraudulent against subsequent purchasers

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for value. The Voluntary Conveyances Act, 1893, protects voluntary deeds—"if *in fact* made *bona fide* and without any fraudulent intent." These words seem clearly to throw the onus of proving the fact on the party seeking the protection of the Act. I have not been able to find any decision on this point; but I am glad to know that I am supported in the view which I have taken by the learned editor of the 3rd edition of May's Fraudulent Conveyances (see pp. 324–5).

It may seem contrary to the settled practice to give relief in a case like this on a ground distinctly different from that alleged in the statement of claim; but I do so in the present case because counsel for the infant defendants put forward in argument the Voluntary Conveyances Act, 1893, as a defence to the action, thereby showing that he was prepared to meet a case under the 1st sect. of the Irish Act (equivalent to the 27th Elizabeth, cap. 4) as well as under the 10th sect. (equivalent to the 13th Elizabeth, cap. 5). The defendants were not therefore taken by surprise.

I shall declare—

(1) That the equitable mortgage by deposit of title-deeds on the 25th February, 1903, created a valid charge upon the lands.

(2) That the voluntary settlement is null and void against the plaintiffs' charge.

(3) That an account be taken of what is due to the plaintiff.

(4) Order that on non-payment of amount found due the premises be sold.

(5) Order the defendants Patrick Behan and Anna H. Behan to pay to the plaintiffs their costs of action, and if same not paid that these costs be added to their demand.

(6) Order the plaintiffs to pay the costs of the infant defendants, and have same as part of their own costs.

I make the latter part of the order as to costs because the infant defendants are wholly innocent parties, and made defendants for the sole purpose of properly constituting the plaintiffs' action. Being infants, they could not have made any admission which would have reduced the costs of the action.

Solicitor for the plaintiffs: *William Henry Dunne.*

Solicitor for the defendant Anna H. Behan and the infant defendants: *Lecins L. O'Reilly.*

A. E. C.

EX PARTE THE BALLINROBE AND CLAREMORRIS LIGHT RAILWAY CO. AND KENNY.

Barton, J.
1913.
Feb. 10, 11.

Deed—Construction—Lands Clauses Acts—Money lodged in Court—Words in deed sufficient to pass—"Situate"—General words—Mortgage—Disentailing deed—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 69—*Railways (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 70), *s.* 18.

X was tenant in tail in remainder, under an indenture of settlement made in 1870, of considerable estates in Galway and in other parts of Ireland. In 1890 a railway company acquired a small portion of the Galway lands under their compulsory powers, and the compensation money was lodged and remained in Court. In 1901, X mortgaged his estates by several instruments in which they were variously described as "all my estates in Galway and wheresoever situate in Ireland," "all my estate situate in Galway and elsewhere in Ireland," and "all my lands, hereditaments, and premises in County Galway, Ireland, and other lands, hereditaments, and premises wheresoever situate in Ireland."

X was adjudicated a bankrupt in England in 1902, and the estate tail in remainder given to him by the settlement having subsequently become an estate in possession, the official receiver and trustee of his estate duly executed a disentailing assurance of the lands comprised in and settled by the indenture of settlement of 1870, "and all other, if any, the tenements and hereditaments of or to which the said X was seised or entitled as tenant in tail, whether at law or in equity, under the said indenture or otherwise howsoever." Upon a summons by the Official Receiver in Bankruptcy for payment out of Court of the compensation moneys, which was opposed by the mortgagee:

Held, (1) that the compensation moneys were not included in the mortgage; (2) that they were included in the disentailing assurance, and should be paid out to the Official Receiver in Bankruptcy.

SUMMONS for payment out of Court of the sum of £57 0*s.* 8*d.* New Consols and dividends thereon, lodged in Court under the provisions of the Railways (Ireland) Act, 1851, under the following circumstances:—

By indenture of settlement, dated the 11th August, 1870, certain lands in Mayo known as the Hollybrook Estate were put in settlement. Under the terms of the settlement Helena Kenny was entitled to the lands as tenant for life, with remainder to her son, William F. Kenny, in tail. In 1890 the Ballinrobe and

Barton, J. 1913.

BALLINROBE AND CLAREMORRIS LIGHT RAILWAY CO. AND KENNY, *Ex parte.*

Claremorris Light Railway Company acquired part of the lands in question under their compulsory powers, and lodged the compensation money in Court. In 1901 and 1902 William F. Kenny, being then tenant in tail in remainder, by a number of deeds mortgaged the following properties, *inter alia*:—"All other lands, hereditaments, and premises in the county of Mayo of or to which the said mortgagor is seised, possessed, or entitled in possession, or reversion, or expectancy, or otherwise howsoever." "All my estates in fee-simple known as Kelly's estate, and situate in Galway and elsewhere in Ireland." "All my estates in Galway and wheresoever situate in Ireland." "All my lands, hereditaments, and premises in the county Galway, Ireland, and any other lands, hereditaments, and premises wheresoever situate in Ireland, whether in possession, expectancy, or reversion in fee-simple." "All lands, hereditaments, and premises situate in the county Mayo, and elsewhere, whether in possession or reversion, which the said William F. Kenny may become possessed of, through an intestacy or otherwise howsoever, in Ireland in fee-simple."

Helena Kenny died on the 26th May, 1903.

William F. Kenny was adjudicated bankrupt by the order of the County Court of Warwickshire, dated the 6th May, 1902, and Charles J. Band was appointed receiver and trustee of his estate. By indenture of disentailing assurance, dated the 27th June, 1904, which was subsequently enrolled, Charles J. Band, as such receiver and trustee, granted to Edward Kennedy the lands therein mentioned, including the estate therein expressed to be "the lands comprised in and settled by the said indenture of the 11th August, 1870, and all other if any the tenements and hereditaments of or to which the said William F. Kenny was seised or entitled as tenant in tail, whether at law or in equity, under the said indenture or otherwise howsoever, to hold the same freed and discharged from the estate tail of the said William F. Kenny and all remainders, estates, and powers to take effect after the determination or in defeasance of such estate tail as to the lands thereby conveyed, unto the said Edward Kennedy in fee-simple to the use of the said Charles J. Band in fee-simple."

The present summons was brought by Charles J. Band,

claiming under the disentailing deed, for payment out to him of the sum lodged in Court, which at the date of the summons amounted to £57 8s. new Consols, and £13 3s. cash. The application was resisted by John Sayers, the mortgagee under the above-mentioned mortgages.

W. M. Jellett, K.C. (with him *Walter Meldon*), for Charles J. Band:—

The fund in Court is not captured by the mortgages, the mortgages only referring to property "situate" in Ireland: *Re Beddington* v. *Baumann* (1); *Re Dowsett* (2). The words of the disentailing deed are wide enough to capture everything subject to the settlement (*Re Skerrett's Trusts*) (3).

Herbert Wilson, K.C., for John Sayers:—

The money in Court represents the land, and is subject to the same liabilities and charges: *Re Stewart* (4). In *Duke of Cleveland's Settled Estates* (5) it was held that money in Court passed under a demise of real estate. The intention of the mortgages was to capture all the mortgagor's interest.

BARTON, J.:—

The moneys in Court represent the proceeds of real estate, and it is agreed by counsel on both sides that they would pass under the words "lands and hereditaments." But the word "situate" does not, in my opinion, aptly fit such moneys. Nobody wishing to refer to the place where "money in Court" is to be found would describe such money as "situate" in that place. In *Crompton* v. *Jarrett* (6), Lindley, L.J., and Bowen, L.J., refused to extend the word "situate" to a subject-matter to which it was, according to its natural meaning, inapplicable. It might be different if there was no other property answering to the description, but there are considerable estates situate in Galway and elsewhere in Ireland, without stretching the meaning of the word "situate." For these

(1) [1903] A. C. 13.
(2) [1901] 1 Ch. 398.
(3) 15 L. R. I. 1.
(4) 1 Sm. & Giff. 32.
(5) [1893] 3 Ch. 244.
(6) 30 Ch. D. 298, 316.

Barton, J.
1913.

BALLINROBE AND CLAREMORRIS LIGHT RAILWAY CO. AND KENNY, *Ex parte.*

reasons I am of opinion that these compensation moneys are not covered by the mortgages.

On the other hand, the words of the disentailing deed are, in my opinion, wide enough to include these moneys, because they include everything that was put in settlement. In that respect the case is like *In re Skerrett's Trusts* (1). The moneys will be paid out to the applicant.

Solicitors for Charles Band: *Meldon & Co.*
Solicitor for John Sayers: *R. W. M'Neice.*

E. C. F.

Wylie, J.
1913.
June 30.
July 8.

IN THE MATTER OF THE ESTATE OF EDWARD CROKER.

Land Purchase Acts—Sale by absolute owner—Death of, prior to Vesting Order — Claim to residue of purchase-money as between real and personal representatives—Conversion—Land Law (Ireland) Act, 1887 (50 & 51 *Vict. c.* 33), *s.* 14, *sub-s.* 1—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 16, *sub-s.* 1, *s.* 24, *sub-s.* 1.

Where an absolute owner of lands, who has entered into agreements for the sale thereof under the Land Purchase Acts, either to his tenants direct or to the Land Commission, dies prior to the vesting of the lands in the purchaser, the claim which attaches to the purchase-money under the order attaching claims, made pursuant to the provisions of s. 14, sub-s. 1, of the Land Law (Ireland) Act, 1887, and s. 24, sub-s. 1, of the Irish Land Act, 1903, or s. 16, sub-s. 1, of the Irish Land Act, 1903, as the case may be, is the claim of the personal representative of the vendor to payment of the residue of such purchase-money, and not the claim of his devisee, where he has devised the lands, or of his heir-at-law, where he dies intestate.

Steele v. *Steele* ([1913] 1 I. R. 292, 299) considered.

OBJECTION by Bithia Mary Croker claiming to be placed on the final schedule as claimant to the residue of the purchase-money of the lands sold in this matter under the Land Purchase Acts, as devisee of John Croker, the heir-at-law of the vendor, on the ground that such residue passed, on the vendor's death, as real estate to his heir-at-law.

(1) 15 L. R. I. 1.

Wylie, J.
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In re CROKER'S ESTATE.

The facts as stated in the judgment of Wylie, J., were as follows:—

Edward Croker, being seised in fee of the lands sold in this matter, on the 1st July, 1906, entered into agreements with the several tenants thereof in the prescribed form for the sale of their respective holdings at the prices mentioned therein. These agreements were lodged by the vendor with the Land Commission on the 13th August, 1906, with an originating application in the prescribed form, and the interest in lieu of rent was put into collection on the 12th September, 1906, and was, when received by the Land Commission, from time to time paid at the vendor's request to his agent, Peter Fitzgerald. The said Edward Croker died intestate on the 17th April, 1910, and the proceedings were continued by order of the 23rd June, 1912, in the name of Martha Croker as personal representative of the said Edward Croker. On the 26th February, 1912, the lands sold were duly declared fit to be regarded as a separate estate for the purposes of the Irish Land Act, 1903. On the 15th June, 1912, the Estates Commissioners duly sanctioned the advances applied for by the several tenants, and on the 1st July, 1912, the several holdings were by fiat vested in the purchasing tenants, and charged with their purchase annuities; and, on the same day, the money was paid into Bank, and the order attaching claims made. After satisfying and discharging all claims upon the purchase-money having priority over the interest of the vendor therein, there remained a residue which, according to the practice and decisions of the Courts hitherto, would be payable to the personal representative of the vendor.

G. A. M'Gusty, for Mrs. Bithia Mary Croker:—

The question is, what was the nature of the claim that attached to the purchase-money by virtue of the order attaching claims. It was the same claim that immediately before the vesting order attached to the lands. The claim that attached to the lands was the claim of the representative of the heir-at-law of the vendor: *Steele* v. *Steele*, per Palles, C.B., pp. 306, *et seq.* (1). The object of

(1) [1913] 1 I. R. 292, 299.

Wylie, J. 1913. *In re* CROKER'S ESTATE.

the Land Purchase Acts is to transfer land from landlord to tenant discharged from all claims superior to the interest of the tenant, not to lay a trap for the vendor by defeating his expressed intention where he has devised the lands, or the claim of his heir-at-law where he dies intestate. Up to the time of the vesting order the vendor is not in a position to know whether the sale will go through or not. The conditional agreements with the tenants can be rescinded by mutual consent up to that time: *In re Scully's Estate* (1). It is not until the agreements are fiated that they are judicially adopted by the Land Commission. Up to that time the claim of the vendor is a claim to the lands, which on his death passes, by virtue of the order attaching claims to the purchase-money, to his devisee or heir-at-law, as the case may be. Where there is an absolute power of sale over real estate, the crucial date for the purpose of ascertaining the rights as between the real and personal representatives is the date on which the power of sale is exercised: *In re Dyson* (2).

E. J. Phelps, for the personal representative of the vendor:—

The decisions since *In re Sherlock's Estate* (3), and many of them since the passing of the Act of 1903, have established the rule of law that once the sale goes through the lands are converted as from the date of the agreements for sale. The personal representative of the vendor is, accordingly, properly on the final schedule as claimant to the residue.

H. D. Conner, K.C., for the parties having carriage.

Cur. adv. vult.

July 8.

WYLIE, J.:

[After stating the facts as above set out, his Lordship continued]—This claim by Mrs. Bithia Mary Croker is directly opposed to my decision in *In re Doyle's Estate* (4), which was based on the decision of Holmes, L.J., in *In re Sherlock's Estate* (5), also to the decision of Barton, J., in *Jones* v. *Bailey* (6), to the clearly

(1) [1912] 1 I. R. 231.
(2) [1910] 1 Ch. 750.
(3) [1899] 2 I. R. 591.
(4) [1907] 1 I. R. 204.
(5) [1899] 2 I. R. at p. 607.
(6) [1910] 1 I. R. 114.

expressed opinion of Meredith, M.R., in *Latham* v. *Travers* (1), to the equally clear opinion expressed by Barton, J., in *Steele* v. *Steele* (2), and to the law and practice prevailing in this Court for the past twenty years, in accordance with which many thousands of pounds have been paid out from time to time. In *In re Finnemor's Estate* (3), in the Court of Appeal, the law was assumed to be as above stated.

The claim, therefore, is not based upon the existing law as administered in this Court, but solely upon an opinion formed by the Lord Chief Baron, and expressed by him in *Steele* v. *Steele* (4), as a provisional opinion only, the point not having been argued, and being immaterial to the decision in that case. That opinion, as I understand it, is in substance this, that though the law as to the conversion of land into money by a land-purchase agreement as between the real and personal representatives of the vendor is correctly laid down by Holmes, L.J., in *In re Sherlock's Estate* (5), in respect of agreements prior to the Act of 1903, the provisions of that Act have altered the law, in the case of agreements to purchase under that Act, in favour of a devisee of the land under the will of the vendor made prior to the purchase agreement, where the vendor dies before completion. And though that opinion was expressed in connexion with the question of the ademption of a devise, I take it, as far as I can gather from the reasoning of the learned Chief Baron, that it would equally apply in favour of the heir-at-law where the vendor dies intestate.

Now the special provision in the Act of 1903, which, according to the Lord Chief Baron, prevents the existing law as to conversion by contract from applying to a contract for sale under the Act of 1903, as distinguished from prior Acts, is contained in sect. 16 of that Act. In his judgment in *Steele* v. *Steele* (4), the Chief Baron says:—"Now, the Act of 1903 contains a provision (sect. 16) that the effect of the vesting order, when the Land Commission agree to purchase the property, is to vest in the Commission the fee-simple of the land . . . discharged from 'the *claims* of all persons who are interested in the land,

(1) [1911] 1 I. R. 148.
(2) [1913] 1 I. R., at p. 296.
(3) [1913] 1 I. R. 137.
(4) [1913] 1 I R., at p. 308.
(5) [1899] 2 I. R., at p. 607.

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whether in respect of superior or intervening interests or incumbrances or otherwise; and *all such claims* shall, as from the date of the vesting order, cease as regards the land'; and then follows a provision not identical with any previous enactment of the code:—'And all such claims shall *attach to the purchase-money, in like manner* as immediately before the date of the order they attached to the land.'" In the judgment the words "attach to the purchase-money in like manner" are italicized as being the words not contained in any previous enactment. But the very same words are contained in sect. 14 of the Act of 1887, which still applies to all purchase agreements entered into between landlord and tenant under the Acts prior to 1903, and is made to apply to direct sales under the Act of 1903, by virtue of sect. 24, sub-sect. 1, of that Act, the only difference being that in sect. 14 the words "immediately before the sale" are used instead of "immediately before the date of the order." I do not myself see that this difference is material with reference to the question of conversion as against the devisee or heir-at-law. If it were material, then a question would arise as to the true construction of sect. 24, sub-sect. 1, because it is in pursuance of sect. 14 of the Act of 1887 that the Land Commission is required by sect. 24, sub-sect. 1, to lodge the money in bank and make the order attaching claims. And as a matter of fact the terms of this order "attach the claims in the same manner as immediately before the *date of the order* they attached to the land." Now, whether the time for ascertaining the claims that are the subject of this statutory transfer from the land to purchase-money be immediately prior to the sale, or immediately prior to the date of the vesting order, let us see what is the nature of the claim of a vendor at that time attaching to the land.

Prior to the Act of 1896 there was some doubt as to the rights of landlord and tenant between the date of a purchase agreement lodged with the Land Commission, and the date of the completion of the sale, but these rights are now clearly defined in sect. 35 of the Act of 1896. That section provides that, "where an agreement for the purchase of a holding is made after the commencement of this Act, and is lodged with the Land Commission, the purchaser shall, in the event of the sale being carried out, be discharged

from all liability to the vendor in respect of any liabilities affecting the holding at the date of the agreement, including all rent and arrears existing at such date; but if the advance is refused, the agreement shall be void, and the tenant shall be liable to pay rent and arrears as if the agreement had not been made." And the same section provides that interest on the purchase-money from the date of the said agreement until the day from which the purchase annuity begins shall be paid half-yearly by the purchaser to the Land Commission, and when received by them such interest up to the date of the advance shall be paid to the person in receipt of the rent at the date of the agreement, or such other person as shall prove himself to be entitled thereto, and if the advance is refused, shall be allowed by the landlord to the tenant as a payment on account of rent. Now, under that section, the vendor's position is clear. From the date of the agreement until the advance is either made or refused, he or anyone claiming through him has merely a right to get, through the Land Commission, the interest on the purchase-money. If the advance is refused, his title to the land as realty remains unaffected by the agreement; and if the advance is made, his former claim to the land ceases, and is by order attached to the purchase-money for the like estate and interest as he had in the land. This section is, as shown by many decisions of the Court of Appeal, still in force, and applies to and regulates the rights of vendor and tenant-purchaser in all direct sales under the Act of 1903, the only difference being that another condition is attached to the carrying out of the agreement, viz., that an *estate* shall be sold of which the holding forms a part.

Again, in cases to which sect. 16 of the Act of 1903 applies, the rights of the vendor are clearly defined in sect. 18 of that Act, which provides that the rents and profits of land agreed to be purchased by the Land Commission shall from the date of the agreement be payable to and recoverable by the Commission in like manner as if they were instalments of purchase annuities charged upon holdings, and interest on the purchase-money at the rate of 3½ per cent. shall be paid by the Land Commission to the person in the receipt of the rent at the date of the agreement, or such other

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person as shall appear to the Land Commission to be entitled thereto, from the date of the agreement until the land is vested in the Commission, and if the land does not become vested in the Commission the foregoing provisions of the section shall cease to have effect as from the date at which the Commission certify that the sale cannot be completed, and then the Land Commission is to render an account as between the moneys received by them and the interest paid. So that a vendor's claim in respect of the land, the purchase-money, and interest thereon, is practically the same in the case of sales to the Land Commission as of sales to purchasing tenants, if we take the vesting order and the certificate of the Commission that the sale cannot be completed, in the one case, as corresponding with the payment of the money into bank and the refusal to sanction the advance respectively, in the other. Therefore in either case, whether the sale is to the Land Commission or to the tenants, if the vendor lives until the contract is carried out or avoided, no difficulty arises. He gets the purchase-money in the one case, and the land in the other.

But supposing the vendor dies before the contract has been carried out or avoided, to whom do his claims pass? If prior to the agreement for sale he had devised the lands in such terms as to show no intention to pass the purchase-money if he should afterwards sell the lands, what claim had the devisee upon the lands after vendor's death, and prior to the completion or avoidance of the sale? Apart from the effect of sect. 16, it seems to me that *Lawes* v. *Bennett* (1), *Weeding* v. *Weeding* (2), and the other authorities following them, show that he had merely a defeasible claim to the land. If the agreement for sale fell through, the lands would remain the real estate of the deceased, and would pass under the devise; if the sale were completed, the purchase-money would be the personal estate of the deceased and pass to his personal representative.

Now, so far as agreements for sale under the Act of 1903 are concerned, all the conditions upon which the carrying out of the agreement depends must be fulfilled prior to the vesting

(1) 1 Cox, Ch. Cas. 167. (2) 1 J. & H. 424.

order or lodging the money in bank. In the words of sect. 24, sub-sect. 1, it is only "in case of the sale of an estate" that the vesting order can be made or the money lodged in bank, and an *estate* is not sold until it has been declared by the Estates Commissioners, and the advances for all the holdings comprised in it have been sanctioned; but when the sale is thus completed, the vesting and lodging the money are merely ministerial acts done to carry out an already binding and completed agreement for sale. As soon as all the advances are sanctioned, the agreements are passed on to the vesting department for fiating, as a matter of course. Therefore it seems to me that the claim of the vendor that attached to the land in this case immediately before the vesting order or lodging money in bank, was not a real claim to the land which could possibly vest or continue vested in a devisee, but a mere personal claim to payment of the purchase-money which was then vested in his personal representative. Then the case of *In re Isaacs* (1) shows that the same law that applies in such a case to a devisee applies to an heir-at-law in case of intestacy.

It seems to me, therefore, that sect. 14 of the Act of 1887, and sects. 16 and 24 of the Act of 1903, can be so construed as to work in perfect harmony with the existing law as to conversion by contract as between the real and personal representatives of a deceased vendor, and that to give sect. 16 a more extended construction would be in contravention of the principle applied by the House of Lords in *De Vesci* v. *O'Connell* (2), which is shortly expressed in the words of Lord Loreburn, where he says, "I think the words in question are to be construed to effect the purposes of the Act, and not to affect parties whom it was not the purpose of the Act to touch." The plain object and purpose of sect. 14 of the Act of 1887, and sect. 16 of the Act of 1903, were to facilitate and expedite the transfer to occupying tenants of the absolutely unencumbered fee-simple of their holdings, where the vendor satisfied the Land Commission that he had a *prima facie* power to sell, without waiting for the full investigation of title, but without prejudice to the right of all persons having

(1) [1894] 3 Ch. 506. (2) [1908] A. C. 298.

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claims on the land to have them satisfied and discharged out of the purchase-money according to their priorities, and without in any way interfering with the rights of claimants *inter se* according to the existing law. I think both sections can be properly construed so as to effect this purpose in its entirety.

I therefore decide against the claim of Mrs. Bithia Mary Croker.

Solicitor for Mrs. Bithia Mary Croker: *Harford Kelly.*

Solicitors for the personal representative of the vendor: *Scallan & Co.*

Solicitors having carriage: *Exham & Son.*

J. E. W.

Wylie, J. 1913. July 22. Oct. 28.

IN THE MATTER OF THE ESTATE OF SIR JAMES D. T. POWER.

Statute of Limitations—Equitable charge on lands appointed in certain shares—One share purchased by the tenant for life of the lands, and portion thereof assigned over by him—Interest paid on the other shares from death of the tenant for life and also on the portion of the share so assigned over, but not on the remaining portion thereof—Claim to the latter barred—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

Certain shares in an equitable charge of £20,000 were appointed, pursuant to a power contained in marriage articles, to the daughters of the marriage, and were by them assigned to the trustees of their respective settlements. £8000, the share appointed to one of the daughters, was afterwards paid off by J. P., the father, who was at the time tenant for life of the lands subject to the charge, and was assigned to him for his own benefit. Subsequently J. P. assigned £3001, portion of this sum of £8000, to the trustees of the settlement of another of the daughters. On his death in 1877 the entire charge became raisable. Since that time interest had been regularly paid on the other appointed shares and also on the £3001, but no payment on foot of principal or interest had been made since that time or acknowledgment given in respect of the £4999 the balance of the said sum of £8000.

Held, that the claim to the £4999 was barred.

Young v. *Lord Waterpark* (8 L. J. Ch. 214) distinguished.

QUESTION OF LAW arising on the ruling of the final schedule as to whether a certain sum of £4999, charged upon the lands sold

in this matter by virtue of articles of agreement, dated the 23rd January, 1843, was now, in the events that had happened, a valid and subsisting charge upon the purchase-money.

The facts upon which the question arose, as stated in the judgment of Wylie, J., were as follows:—By articles of agreement executed on the marriage of James Power, son of Sir John Power with Jane Talbot, the said Sir John Power, being then seised in fee of the lands sold in this matter, agreed that the same should be limited to the use of himself for life, then to the use of the said James Power for life, and, after his death, to the use of trustees for a term of five hundred years, upon the trusts therein mentioned, and subject thereto to the use of the first son of the said marriage, and the heirs of his body, with remainders over. The trusts of the said term, in the events that happened, were to raise a sum of £20,000 for all and every, or such one or more, of the younger children of the said marriage, and in such shares as the said James Power and his said wife should jointly appoint.

There were six children of the said marriage, three sons and three daughters. On the marriage of each of the said daughters in 1870, 1872, and 1873 respectively, the said James Power and his wife appointed to each daughter a share of the said sum of £20,000, and each daughter, by her marriage settlement, assigned her appointed share to the trustees thereof. The sum of £1 only was unappointed.

The share appointed to Mrs. Devereux, one of the said daughters, amounted to £8000; and in 1876, after the death of Mrs. Devereux, Sir James Power, who was then tenant for life of the lands charged therewith, paid off the said sum, and the same was assigned to him by a deed of the 20th November, 1876, the deed expressly stating that he was paying off the same, and taking an assignment thereof, not in exoneration of the lands charged, but for his own benefit.

The said Sir James Power made his will on the 15th May, 1877, and thereby purported to give to the trustees of the marriage settlement of Mrs. O'Reilly, another of the said daughters, the sum of £3001, part of the said sum of £8000, so paid off by and assigned to himself, and appointed his five surviving children his

Wylie, J. 1913. *In re* POWER'S ESTATE.

residuary legatees. Then by a codicil dated the 30th May, 1877, this bequest to the said trustees was revoked, the testator having in the meantime by deed assigned the sum of £3001, part of the said sum of £8000, to the said trustees. The said Sir James Power died on the 30th September, 1877, and probate of his will was granted to testator's widow, Lady Power, his son, James Talbot Power, and his son-in-law, Joseph O'Reilly, the executrix and executors named in the will.

Interest had since been regularly paid upon the other appointed shares of the said sum of £20,000, and also upon the said sum of £3001, but no payment had ever been made on foot of principal or interest, or acknowledgment given, in respect of the sum of £4999, the balance of the said sum of £8000, and no claim had ever been made in respect thereof until the question was now raised by the examiner as to whether the said sum was now, in the events that had happened, a valid and subsisting charge.

The question of "stale demand" was also now argued, but the case is only reported on the question as to whether the claim was barred by the Statute of Limitations.

Ronan, K.C., W. M. Jellett, K.C. (with them *F. M. Mooney*), for the vendor:—

The claim to the £4999 is clearly barred under section 8 of the Real Property Limitation Act, 1874. This section superseded section 40 of the Act of 1833. Under section 40 it was held in *Young* v. *Lord Waterpark* (1), where a term was vested in trustees for raising portions for younger children, and affirmed on appeal, that an express trust prevented the section from operating as a bar. But now by sect. 10 of the Act of 1874 the time for recovering charges is not to be enlarged by express trusts for raising the same; and see *Williams* v. *Williams* (2), a decision under that section, where it was held that a conveyance of a term on trust for raising money was such an express trust. The reports of *Young* v. *Lord Waterpark* (1), which related to proceedings in that case which took place in 1842, are referred to

(1) 13 Sim. 204; 6 Jur. 656. On appeal, 15 L. J. Ch. 63; 10 Jur. 1.

(2) [1900] 1 Ch. 152.

with approval in many of the text-books. Mr. Poole has unearthed a report (1) of a decision in proceedings in the same case that took place in 1839. That report is not referred to in any of the text-books, and the decision as reported is contrary to law. If £1000 charged on lands is given to each of three persons, a payment on foot of the claim of two will not keep alive the claim of the third. The same result follows if £3000 is given to the three persons in equal shares. In the notes to section 8 of the Act of 1874 in Carson's Real Property Statutes (2nd ed., p. 193), it is stated—"The words in section 40 'by the person by whom the same shall be payable or his agent,' apply equally to the making of a payment and the signing of an acknowledgment," and *Chinnery* v. *Evans* (2) and *Harlock* v. *Ashberry* (3) are referred to. The persons entitled to receive the £4999 were the executors of Sir James Power. There has been no payment on foot of principal or interest to the persons entitled thereto, or acknowledgment given by the person by whom the same was payable.

S. L. Brown, K.C., and *Hewitt Poole*, for four of the residuary legatees under the will of Sir James Power:—

The payment of interest on the £3001 kept alive the claim to the £4999, the balance of the £8000: *Young* v. *Lord Waterpark* (4), where it was held that a payment by way of compromise to one of several claimants to a charge on real estate took the case out of the Statute of Limitations in favour of the other claimants. Here the two sums must be regarded as a single unit. The subsequent splitting up of the £8000 appointed pursuant to the power is a different thing to the splitting up of it as a direct result of the exercise of the power. Further, there never was a hand to receive any portion of the charge so as to enable a discharge to be given to the inheritance: *M'Carthy* v. *Daunt* (5). The executors of Sir James Power could not have done so *qua* the £4999: *In re Hughes' Trusts* (6). All the owners of the charge could have done was to bring an action to have trustees of the term appointed, and direct them to raise the charge. The trustees

(1) 8 L. J. Ch. 214.
(2) 11 H. L. C. 115, 121.
(3) 19 Ch. Div. 539.
(4) 8 L. J. Ch. 214.
(5) 11 Ir. Eq. R. 29.
(6) 2 H. & M. 89.

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would have been bound to raise the whole of the £20,000: *Leech* v. *Leech* (1). The charge would be vested in the trustees of the term. The beneficiaries have no charge vested in them. The absence of trustees would prevent the statute from running. By the marriage articles of 1843 Sir John Power agreed *inter alia* to create a legal term to secure the charge. Equity deems what was agreed to be done as done. The vendor, claiming under Sir John Power the settlor, cannot rely on the absence of the legal term to the prejudice of those claiming any portion of the charge. [They also referred to *In re Coane* (2).]

Cur. adv. vult.

Oct. 28

WYLIE, J.:—

The question in this case is whether a certain sum of £4999, charged upon the lands sold in this matter by virtue of articles of agreement, dated the 23rd January, 1843, is now, in the events that have happened, a valid and subsisting charge upon the purchase-money. [His Lordship stated the facts as above set out, and continued.] Now, it is quite clear upon the evidence before me, apart from any presumption that might arise from subsequent events, and, indeed, it is admitted by all parties, that, at the time of his death in 1877, Sir James Power was entitled to the sum of £4999, balance of the said sum of £8000 remaining after the said assignment by him of the said sum of £3001, as a charge upon the lands sold, and that the same, if not merged, formed part of his residuary personal estate bequeathed to his five children in equal shares. It is also proved by Mr. B. J. O'Flaherty, the agent and solicitor for the vendor and his predecessor in title, that, although interest has been regularly paid from the death of Sir James Power in 1877 until the present time upon the other appointed shares of the £20,000, and also upon the £3001, part of the share of £8000, assigned as already mentioned by Sir James Power to the trustees of Mrs. O'Reilly's marriage settlement, no payment has ever been made on foot of principal or interest in respect of the £4999, balance of the £8000, to which Sir James Power was absolutely entitled at the time of his death, nor has any claim ever been made in

(1) 2 Dr. & War. 568. (2) 8 Ir. J. (N. S.) 124.

respect of the said sum, until the question was raised by the Examiner on the investigation of the title to the purchase-money. How is the fact of no claim for a period of thirty-five years to be accounted for?

I am not quite sure whether counsel for the residuary legatees seriously suggested that the existence of this charge had been overlooked or forgotten. But there are several reasons why such a suggestion could hardly be entertained. In the first place, the will of Sir James Power is a comparatively short and simple document, and the existence of this charge as the absolute property of the testator is expressly mentioned on the face of the will.

In the second place, the solicitor who prepared and proved the will is the same as the solicitor who only six months previously had prepared and completed the assignment of this charge of £8000 to the testator for his own benefit. It was also the same solicitor who carried out the administration of the estate, and prepared the deed of release to the executors in August, 1880, and the schedules to the said deed setting forth all the unadministered assets of the deceased.

In the third place, two of the executors are gentlemen of great intelligence and business capacity, who must have read the will and noticed the charge, and, being each entitled to one-fifth of it, would not be likely to have overlooked it. Besides, those executors are still living and available witnesses, and neither of them has filed any affidavit or given any explanation of the matter.

The only explanation that appears to me really possible and consistent with the facts is this, that the testator before his death intended that this unassigned balance of the charge of £8000 should merge in the inheritance, and expressed such intention to his solicitor, or his executors, or perhaps all of them; and that they and the other beneficiaries, being informed of the fact, acquiesced, or that, by some arrangement between the beneficiaries, the executors, and Sir John Power, the next tenant for life of the estate, all claim in respect of this charge was abandoned or in some way got rid of. Even actual payment by Sir John Power to the executors or their solicitor between 1877 and 1880,

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is quite possible and consistent with the evidence. Sir John was himself entitled to one-fifth of the charge. The release of 1880 states that the executrix and executors collected the personal estate, and thereout paid the funeral and testamentary expenses of the testator and such of his debts as were payable out of his personal estate, and also his pecuniary legacies. There is nothing in this deed, or the schedules thereto, inconsistent with such payment either to the executors or to Mr. Keogh, their solicitor, who was carrying out the administration of the assets; and, as I have said, there is no affidavit by the executors, either of explanation or denial of payment.

Now, in this state of facts, if it were necessary for me to decide the question before me on some such presumption of fact as I have indicated, or on the ground of laches or delay, I think it would be open to me to do so after a lapse of thirty-five years; but I have only referred to this view of the case in deference to the arguments of counsel, as I am satisfied that the other answer made to the claim is too clear for argument.

On the death of Sir James Power in 1877, the right to this charge of £4999 vested in his executors. The charge was a mere equitable one, one not secured by any legal term, nor was it vested at any time in any trustees, except the trustees of Mrs. Devereux's settlement, by whom it was assigned to the testator. It was raisable on the death of testator. Therefore it appears to me clear that thereupon a present right to receive the sum so charged accrued to the executors, who were the persons, and the only persons, capable of giving a discharge for or release of the same; and the claim is therefore barred by statute, unless there was part payment of principal or interest, or an acknowledgment, within the meaning of sect. 8 of the Act of 1874.

The evidence is clear that there was no such payment or acknowledgment in respect of the sum of £4999, nor is any such suggested. But what seemed to me an extraordinary argument was put forward, viz., that because the sum of £1000, and the sum of £3001 assigned by testator to the trustees of Mrs. O'Reilly's settlement in May, 1877, were, prior to that date, parts of the same appointed share of £8000, and as interest has been paid since the testator's death to the said trustees on the sum of £3001,

that payment amounts to part payment of interest within the section, so as to keep alive the claim for the £4999, though it is not suggested that the payment of interest on the other two appointed shares of the £20,000 could have any such effect.

After the death of Sir James Power, the debt and charge of £3001, due and owing to the trustees of Mrs. O'Reilly's marriage settlement, were, in my opinion, as separate and distinct from the debt and charge of £4999, due and owing to the executors of Sir James Power, as if the two sums had never formed part of the same sum of £8000, but had originally been separate and distinct charges. A payment to prevent the bar of the statute must, in the words of sect. 8, be a payment of some part of the principal money or some interest thereon to the person entitled thereto or his agent. What is the principal money claimed here? £4999 which formed part of the personal estate of Sir James Power. Who were the persons entitled to receive it? The executors of Sir James Power, and they only. How, then, can it be said that payment to the trustees of Mrs. O'Reilly's marriage settlement of interest on a sum of £3001, which they, and they only, were entitled to receive, and in which the executors of Sir James Power had no interest whatever, is a payment of some interest on the charge of £4999, which the executors of Sir James Power, and they only, were entitled to receive, and in respect of which the trustees of Mrs. O'Reilly's marriage settlement had no interest. The argument really seems to me to be too ludicrous to require an answer. The payment of interest on the sum of £3001 is quite consistent with the merger or payment off of the charge of £4999, and would have continued on in the same way if the latter sum had been paid off.

The case seems to me so absolutely clear and unarguable that I do not think it necessary to refer to or deal with any of the authorities cited in the argument, except the case of *Young* v. *Lord Waterpark* (1), which Mr. Poole seemed to rely upon as an authority applicable to this case.

In that case a sum of £10,000 was charged for younger children, and secured by a term of five hundred years vested

(1) 8 L. J. Ch. 214.

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in trustees. There were seven younger children; three of them got shares appointed and settled on their respective marriages, amounting in all to £7000. The remaining £3000 was unappointed, and, in the events that happened, became payable in 1804. In 1829 the administratrix of one of the children to whom no appointment had been made filed her bill against the owner of the lands and other parties, amongst whom were two other of the children who had no appointed share, and also, I presume, the trustee of the term, as otherwise the suit would have been defective for want of parties. The bill claimed payment of the plaintiff's share of the £3000 unappointed. The suit was compromised in 1837, and £1000 and certain costs were paid to the plaintiff, and the bill dismissed. Under the circumstances the payment was of course equivalent to a payment to the trustee. In the answer to the bill in that suit, one of the other children also claimed his share. In 1838 the representatives of the two other children filed a similar bill, claiming the unpaid balance of the £3000. The owner of the lands relied upon the Statute of Limitations as a bar, but the Vice-Chancellor held that under the circumstances the payment of the £1000 in the first action was clearly a part payment of principal within the statute. I cannot myself see how he could have held otherwise. It was, in effect, a payment to the trustee of the term of £1000, in satisfaction of the plaintiff's share of the sum of £3000, which was the subject-matter of the suit. But how that decision, whether right or wrong, can apply to the facts of the present case passes my comprehension.

I, therefore, hold that the claim to this charge is barred by statute.

Solicitors for the vendor: *B. J. O'Flaherty & Son.*

Solicitors for the residuary legatees: *D. and T. Fitzgerald.*

J. E. W.

FRAZER AND ANOTHER *v.* RIVERSDALE AND ANOTHER.

Ross, J.
1912.
June 24, 25, 26.
July 2.

(1912. No. 947.)

Will—Power of appointment—Invalid execution—Power to be exercised by ante-nuptial settlement with consent of trustees of will—Post-nuptial settlement executed without such consent and in ignorance of power—Possession under invalid settlement—Title under will barred—Estate tail—Statute of Limitations—Real Property Limitation Act, 1833 (3 & 4 *Wm.* 4, *c.* 27), *ss.* 21, 34—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.

By a post-nuptial settlement made in the year 1877 between C., the wife, W., the husband, and the trustees of their ante-nuptial settlement, reciting that C. and her husband in her right had become entitled to the absolute interest in certain lands known as the W. S. estate, a life estate in these lands was limited to W., if he survived C., with successive life estates to the three children of the marriage, with remainders to their children in tail. All the parties at the time erroneously believed that the estate had vested in C. for an absolute estate in fee-simple, as heiress-at-law of her grand-uncle. In fact, however, C.'s father, J., had survived this grand-uncle, and was his heir-at-law, and as such the lands had vested in him for an estate in fee-simple in remainder, subject to certain prior estates which subsequently determined. J. had died before C.'s marriage, having made a will by which he devised all his real estate to C. for life, with remainder to her first and other sons in tail male, and he empowered the trustees for the time being of his will, with the consent of C., to convey the lands by a settlement to be made on the occasion of her marriage to C. and her husband for their joint lives and the life of the survivor. The will contained provisions altering the limitations in favour of C.'s sons in case of her marriage with a husband entitled to real estate of certain value. The trustees of this will were not parties to the settlement of 1877.

C. died in 1882, and W. thereupon entered into possession of the W. S. estate, and continued in possession until his death in 1905. The eldest son of the marriage had died in 1900, and on the death of W., the second son, R. (who was entitled to a life estate under the settlement, and to an estate tail, in

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not barred by the Statute of Limitations, under the will), entered into possession. R. was entitled to an estate tail in certain other lands, and after his father's death he executed a disentailing deed which contained general words barring all his estates tail. He died in 1907, having made a will devising all his lands to his wife, through whom the plaintiffs claimed as assignees in her bankruptcy. On the death of R., the defendant, the third child of the marriage of W. and C., went into possession of the W. S. estate, she being entitled under the settlement to the next life estate. Until shortly before the bringing of the present action all parties believed that the settlement of 1877 was a valid settlement. The action sought a declaration that the plaintiffs were entitled to the W. S. estate in fee-simple, and an order that the defendant should deliver up possession to them, the plaintiffs claiming under the will of J., and through R.

Held, that the settlement of 1877 was not a good execution of the power given by J.'s will, inasmuch as it was not executed on the occasion of C.'s marriage, and the trustees of that will were not parties to it; that the possession of W. was therefore wrongful, and that although having entered under the settlement he would have been estopped from repudiating any of the limitations created by it, his possession operated under the Statute of Limitations to extinguish the title of his eldest son to the estate tail given by J.'s will, and consequently also the title of R. to the subsequent estate tail under that will, and that the plaintiffs had no right to possession.

TRIAL OF ACTION.

The action was brought by the plaintiffs, the assignees of Caroline Alcock Stawell Riversdale, for a declaration that William Alcock Stawell Riversdale was at the time of his death, on 6th May, 1907, seised in fee-simple free from all mortgages and incumbrances purported to be created by William Alcock Stawell (his father) and Charlotte Harriet Esther Alcock Stawell (his mother), of and in all the hereditaments, lands, and premises, which passed under the will of William Stawell deceased, dated 20th April, 1822, and that on the death of William Alcock Stawell Riversdale, his widow, Caroline Alcock Stawell Riversdale, became entitled to the possession of the said William Stawell estate as owner in fee-simple under her husband's will; and for an order that the defendant Esther Mary Alcock Stawell Riversdale should deliver up to the plaintiffs possession of the lands and premises

comprised in the William Stawell estate. The defendants pleaded *inter alia* (*a*) possession, (*b*) the Statute of Limitations.

The facts and the nature of the arguments sufficiently appear from the judgment of Ross, J.

Serjeant Matheson, K.C., Jellett, K.C., Cole-Bowen and *Brunskill*, for the plaintiffs :—

Ronan, K.C., Herbert Wilson, K.C., and *E. M. Fitzgerald*, for the defendant Esther Mary Alcock Stawell Riversdale.

H. D. Conner, K.C., and *Norwood*, for Joseph H. Gubbins, a mortgagee.

Cur. adv. vult.

July 2.

Ross, J. :—

This action illustrates the peril to which a vendor of Irish land under the Purchase Acts is exposed. When the land is converted into money, the title is subjected to the keen scrutiny of the examiners, and the vendor may lose the purchase-money of the property he has contracted to sell.

Jonas Stawell, by his will dated 22nd June, 1829, devised his lands of Kilbrittain, of which he was seised in fee-simple, and all other real estate he had, or should have power to dispose of, to trustees to the use of his only daughter Charlotte, with remainder in tail male, and with divers remainders over. He empowered his daughter, by settlement to be made on the occasion of her marriage, to encumber his lands with any sum not less than £6000, for the younger children of her marriage. He empowered and directed his trustees or any other trustees substituted in their place, with the consent and by the desire of his daughter, in addition to the devises and limitation in his will, to convey the lands by such marriage settlement to his daughter Charlotte and her husband for their joint lives.

By her marriage settlement dated 17th of September, 1845, the lands of Kilbrittain were settled, and a life estate was given to her husband William Alcock, in the lands of Kilbrittain.

In the year 1866, under the will of his uncle William Stawell, owing to the failure of all the prior limitations, the ultimate remainder in fee in the William Stawell estate, which was vested

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in Jonas Stawell as the heir of his uncle, became an interest in possession.

Jones Stawell died in 1835, and the William Stawell estate that had thus come to him became subject to the disposition in his will declared in respect of all his real estate. His daughter Charlotte Alcock in 1866, on the death of the Rev. Francis Stawell —a tenant for life—thus became entitled in possession as tenant for her life. As we have seen, the marriage settlement of 1845 dealt only with the Kilbrittain estate expressly, but it contained a covenant that all property that was to come to her by deed, will, or descent, no matter what was the nature of the estate and interest of the property, should be under her absolute control and for her sole enjoyment notwithstanding her coverture.

This William Stawell estate came to her as we have seen through her father Jonas Stawell. But it is plain that she and all the family erroneously believed that it had come to her as the heiress-at-law of her great-uncle William Stawell, in which case she would have had an absolute estate. There were three children of the marriage, Jonas the eldest son, William Riversdale the second son, and one daughter, the defendant Esther Alcock, now Esther Riversdale.

By seven mortgages, executed between the years 1869 and 1877, Charlotte Stawell, and her husband William, charged the lands with about £20,000. All these mortgages are vested in Miss Esther Riversdale and Mr. Gubbins, the defendants in this action.

A deed was executed on 10th November, 1877, by Charlotte Stawell, and her husband, and the trustees of her marriage settlement. The three children, Jonas, William, and Esther, are represented as parties to it, but as a matter of fact they never executed it at all.

The deed erroneously recited that Charlotte Stawell, and her husband William Stawell in her right, had become entitled to the absolute interest in the lands of the Stawell estate. It purported to ratify and confirm all the said mortgages. It purported, by the security of a term of years, to secure an annuity of £200 to Jonas Stawell, during the joint lives of himself and his father William Stawell in case they should survive

Charlotte Stawell, until his marriage, and after his marriage an annuity of £600 was provided in lieu of the £200. It conferred a life estate on William Stawell if he survived his wife. It then conferred successive estate for life with remainders in tail on Jonas, William, and Miss Esther Riversdale. The term of years was so limited that a sum of £12,000 was to be raised for Miss Esther Riversdale, and a sum of £5000 for William Riversdale. The rest of the deed is not material.

Charlotte Stawell died on 27th July, 1882, and her husband, Colonel William Alcock Stawell, entered into possession of the Stawell estate on her death. He continued in possession to the time of his death, which occurred on the 5th June, 1905. Jonas had died in his lifetime on the 27th February, 1900.

On the death of his father, William Riversdale, the second son had entered into possession of the Stawell estate, and disentailed the estates on the 28th of June, 1905. By his will, he devised the estates to his wife, the plaintiff Mrs. Riversdale. He died in May, 1907. His father, Colonel William Alcock Stawell, devised all his estates to his daughter Esther Riversdale, who on the death of William Riversdale entered into possession of the Stawell estate.

These are the circumstances briefly stated. There is no question of fact in issue. There is one inference of fact to be drawn, as all parties admit, and it is this, that whatever the rights of the parties may be, everybody believed that the deed of 1877 was a valid deed until the point was raised by Mr. Dick, the examiner who read the title.

It is now contended that the power given by the will of Jonas to his daughter Charlotte was duly exercised by the deed of 1877. There can be no doubt that, if this is so, Charlotte Stawell exercised the power without being aware that she was exercising a power contained in her father's will. She believed that she had become the absolute owner as William Stawell's heiress-at-law. This is, however, of no importance. If she intended the property to pass, and had the power in any capacity to transfer it, such property would have effectually passed under the deed.

We have now to consider whether the power in the will was legally exercised by the donee. It is contended for the plaintiff

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that its exercise at the time of the marriage, through the marriage settlement, and by the trustees, is not of the essence of the matter; that all this was only machinery, and not essential to a valid exercise of the power. On the other hand, the defendants insist on the ordinary rule that every circumstance required by the instrument creating the power to accompany the execution of it must be strictly observed.

It is to be noted that this is not a case in which equity is invoked to aid a defective execution. The considerations applicable in such a case need not be noticed here. As counsel for the plaintiff admit, we have only to consider whether the execution is valid or invalid.

The extreme view is stated by Lord Ellenborough in *Hawkins* v. *Kemp* (1)—"If these circumstances be unessential and unimportant, except as they are required by the creators of the power, they can only be satisfied by a strictly literal and precise performance. They are incapable of admitting any substitution; because these requisitions have no spirit in them which can be otherwise satisfied; incapable of receiving any equivalent because they are in themselves of no value." Again, as put by Mr. Justice Wightman in *Rutland* v. *Wythe* (2), "Whatever arbitrary terms the grantor of the power may impose upon the party executing it, or however absurd and unreasonable they may appear to be, they must be fulfilled; as if it were required that the instrument executing the lease should be witnessed by persons of a particular stature or written upon paper of a particular colour."

It is quite clear, at all events, that essential requisites cannot be dispensed with.

The requisitions to be considered in this will are three in number. First, that the trustees should join in the will; second, that the power should be executed on the occasion of the marriage; and third, that it should be executed by the settlement itself.

It is plain that the duties of the trustees of this will were not intended to be merely formal. In case of his daughter's marriage with a husband entitled to real estate of the value of £6000 per annum, the testator directs that the lands in question are to be

(1) 3 East, 410, at p. 440. (2) 10 Cl. & F. 419.

limited and entailed upon the second son of the marriage, if there should be a second son. It was plainly the duty of the trustees to make the inquiries necessary for having this requirement carried into effect.

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As regards the propriety of conferring a life estate on a husband, I think the trustees could not prevent the intended wife, if she so desired, from conferring such life estate. But there is surely some importance to be attached to the requirement that they should be executing parties to the settlement conferring such life estate. Whether they executed the settlement in her presence or elsewhere, it ensured this, that their minds were directed to the matter, and that they had an opportunity of remonstrance in case they thought such an act was imprudent or unnecessary.

Next, we have to consider the requirement that the creation of such life estate should be done by the marriage settlement, and on the occasion of the marriage, if done at all. The interposition of a life estate in the husband, over-riding the limitation in favour of the children of the marriage, is certainly a matter of great moment to the children. If the power were not to be exercised on the occasion of the marriage, it could be effectively exercised by the wife at any time down to the time of her death. When the children became adults and were about to make arrangements for the future, it would be of the utmost importance to them to know exactly how the family property was to go.

The decision of Lord Cairns and Sir John Rolt in *Cooper* v. *Martin* (1) shows the importance of this—that the children should be able to know within a definite time what their vested and transmissible rights were.

For these reasons I am of opinion that the requirements of the testator to which I have referred were essential matters. These requirements have not been complied with, and therefore the deed of 1877 was incapable of conferring a life estate on Colonel William Alcock Stawell.

Charlotte Alcock Stawell, his wife, died on the 27th July, 1882, and thereupon Colonel Stawell entered into the receipt of

(1) L. R. 3 Ch. A., 47.

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the rents and profits of the William Stawell estate. He did so under the erroneous belief that he had a valid life estate in the property. He continued in possession down to the date of his death on the 5th June, 1905.

The uncontested fact that all parties believed him to be lawfully in possession under the deed of 1877 disposes of any contention that he occupied under an arrangement with his son Jonas, the first tenant in tail. Colonel Stawell was, therefore, wrongfully in possession.

What, then, was the position on the expiration of twelve years after the wife's death? Under sect. 34 of the statute of 1833, the title of Jonas, the tenant in tail, was extinguished. Under sect. 21 of the same statute, the estate tail in William Riversdale, which would have come into existence on the death of his brother, was barred.

What, then, was the position of Colonel William Alcock Stawell? He had entered under the deed of 1877. He is estopped from repudiating any of the charges or limitations created by the deed under which he himself entered. Neither he nor his devisee could be allowed to set up a title adverse to the deed. He could not have repudiated the annuity of £200 created in favour of Jonas, nor the successive life estates in Jonas, William Riversdale, and Esther Riversdale: *Board* v. *Board* (1); *Dalton* v. *Fitzgerald* (2). But this wrongful possession, as against Jonas, the tenant in tail, destroyed the title of Jonas in that capacity.

Does it make any difference that William Riversdale was in possession when he barred the estate tail? I think not. His estate tail had ceased to exist. The only title under which he was in possession was the tenancy for life by estoppel created under the deed of 1877.

It only remains to consider one other contention, Was Colonel William Stawell in exclusive possession? As regards the annuity of £200 per annum, it does not affect the case, because on the evidence it is plain that it was never paid. Even if it had been paid, such payment could not have affected the possession.

It appears that Jonas Stawell lived with his father in Kil-

(1) L. R. 9 Q. B. 48. (2) [1897] 2 Ch. 86.

brittain Castle for some time, and when his father went to reside elsewhere the establishment was still kept up, and Jonas Stawell lived at the castle whenever he wished. Now Kilbrittain Castle is not on the William Stawell estate at all; it is on the Kilbrittain estate. But the rents which were collected by the agents were applied by the direction of Colonel Stawell in the upkeep of the establishment. Jonas Stawell, who seems to have had a comfortable income, allowed the rents of another property of his own to be applied in the same way. He actually made a yearly allowance to his father, Colonel Stawell, and to his sister, Miss Esther Riversdale. It is plain, however, that the rents of the William Stawell estate were paid to the agents of Colonel Stawell, and applied as he directed. If his son Jonas enjoyed his hospitality in Kilbrittain Castle, or resided there in his absence, this in no way affected the possession of the William Stawell estate, which was in the exclusive possession of his father.

I desire to point out that I do not now decide who is entitled now to the William Stawell estate, nor do I decide anything as to the position of the mortgagees. This action is in the nature of an equitable ejectment on the title, and I find simply that there is no title to recover possession in the plaintiffs. I therefore dismiss the action with costs.

Solicitors for the plaintiffs: *Collis & Ward.*

Solicitors for the defendant Miss Riversdale: *S. S.* and *E. Reeves & Sons.*

Solicitor for Joseph H. Gubbins: *Gregg, Jermyn, & Sons.*

D. M. S.

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ADMINISTRATION OF ASSETS—*Executor's right of retainer—Specialty and simple contract creditors—Hinde Palmer's Act*, 1869 (32 & 33 *Vict. c.* 46).] It has never been the practice in Ireland, in the administration of assets, to form two funds, one in respect of specialty debts, and the other in respect of simple contract debts, for the purpose of postponing an executor's simple contract debt to specialty debts. The executor may retain his simple contract debt as against both specialty and simple contract creditors, inasmuch as, by Hinde Palmer's Act, both classes of creditors are made of equal degree as regards priority of payment in the administration of estates. The *ratio decidendi* of the Court of Appeal in England, in *In re Samson* ([1906] 2 Ch. 584), and the opinion of Neville, J., in *In re Jennes* (53 Sol. Journ. 376), applied in support of the executor's right of retainer. *Wilson* v. *Coxwell* (23 Ch. D. 764), and *In re Jones*; *Calver* v. *Laxton* (31 Ch. D. 440), not followed. *Olpherts* v. *Coryton*
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ADMINISTRATION OF ASSETS—*continued.*

2. —— *Executor—Retainer—Payment into Court —Assets—Constructive possession by legal personal representative—Two estates being administered in one action—Transference of fund from one estate to the other.*] The estates of *A* and *B* were administered in one action. The estate of *B* (who was *A*'s executor) was entitled to the residue of the estate of *A* when ascertained. *B*'s executor, who was a creditor of *B*, brought the action as executor and creditor on behalf of himself and all other creditors; and asserted his right of retainer in the statement of claim, and throughout the proceedings. *A*'s estate was realized, and the money representing the proceeds was brought into Court. The executor of *B* died pending the suit, which was continued by substituting his executors as plaintiffs. After *A*'s estate had been realized, an order was made upon the application of the plaintiffs, directing an inquiry to ascertain what part of the funds in Court represented the residue of *A*'s estate, and ordering the same to be transferred to the credit of *B*'s estate, and it wa declared that the plaintiffs were entitled to exercise their right of retainer, as the executors of *B*'s executor, in respect of the amount so ascertained, in discharge of the debt due to them from *B*'s estate. *Taaffe* v. *Taaffe* ([1902] 1 I.R. 148) applied; *Pulman* v. *Meadows* ([1901] 1 Ch. 233) distinguished. *Olpherts* v. *Coryton* (No. 2)
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AFFIDAVIT—Prepared without reference to person who is to swear it—Weight of
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AMENDMENT OF WRIT—*No title at date of issue of writ—Subsequent acquirement of title—Amendment of writ.*] *A B*, believing that *X* died intestate, took out administration intestate to him, and commenced an action as such administrator against *C D*. *C D*, who had been aware that *X* left a will, appointing him executor, declared that fact for the first time in his defence, and thereupon *A B* took out administration with the will annexed (*C D* having renounced), and sought to amend the pleadings accordingly. *Held*, that *A B*'s application must be refused, as at the date of the issue of the writ she had no title to sue. *Creed* v. *Creed* - - - [BARTON, J., 48

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—— *Canadian Land Reclaiming and Colonizing Co.; Coventry and Dixon's Case* (14 Ch. D. 660, 668) followed - - - 352
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—— *Cavendish Bentinck* v. *Fenn* (12 A. C. 652) applied - - - - - 352
See COMPANY. 1.

—— *Dalton* v. *Fitzgerald* ([1897] 2 Ch. 86) distinguished - - - - - 280
See ESTOPPEL.

—— *Doe d. Tremewen* v. *Permewen* (11 A. and E. 431) applied - - - - 143
See WILL. 3.

—— *Doyle's Estate, In re* ([1907] 1 I. R. 204) considered - - - 292, 299
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—— *Jennes, In re* (53 Sol. Journ. 376) opinion of Neville, J., applied - - 211
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—— *Jones, In re*; *Calver* v. *Laxton* (31 Ch. D. 440) not followed - - 211
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—— *Lewis* v. *Puxley* (16 M. & W. 733) applied [143
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—— *Lovelace* v. *Lovelace* (Cro. Eliz. 40) distinguished - - - - - 143
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—— *Mills* v. *Carson* (10 R. P. C. 9) distinguished [95
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—— *Paine* v. *Jones* (L. R. 18 Eq. 320) considered and applied - - - - - 280
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—— *Pulman* v. *Meadows* ([1901] 1 Ch. 233) distinguished - - - - - 381
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—— *Rodney* v. *Chambers* (2 East. 283) commented on - - - - - - 154, 428

—— *Salusbury* v. *Denton* (3 K. & J. 529) applied
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—— *Samson, In re* ([1906] 2 Ch. 584), *ratio decidendi* applied - - - - - 211
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—— *Sheridan* v. *O'Reilly* ([1900] 1 I. R. 386) distinguished - - - - - 143
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—— *Sherlock's Estate, In re* ([1899] 2 I. R. 561, 591) considered - - 292, 299
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—— *Steele* v. *Steele* ([1913] 1 I. R. 292, 299) considered - - - - - - 522
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—— *Stringer's Estate, In re* (6 Ch. D. 1) considered and applied - - - 280
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—— *Taaffe* v. *Taaffe* ([1902] 1 I. R. 148) applied
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—— *Trevor* v. *Whitworth* (12 A. C. 409) applied
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—— *Ward* v. *Dyas* (Ll. & G. *temp.* Sugden, 177) distinguished - - - 177, 182
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—— *Wilson* v. *Cozwell* (23 Ch. D. 764) not followed - - - - - 211
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—— *Wright* v. *Rogers* (1 P. & D. 678) distinguished - - - - - 31
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—— *Young* v. *Lord Waterpark* (8 L. J. Ch. 214) distinguished - - - - - 530
See LIMITATIONS, STATUTE OF. 6.

CAUSE OF ACTION—None when writ issued —Amendment - - - - - 48
See AMENDMENT OF WRIT.

CHANGE OF INVESTMENT—Ademption
See POWER OF APPOINTMENT. 1. [232

CHARITY — *Will — Construction — Charitable devise—Will executed within three months of death —7 & 8 Vict. c. 97, s. 16—Devise to parish priest—Gift to the office and not for personal benefit—Trust for heir-at-law and annuitant.*] By his will dated 14th June, 1888, a testator, after devising a life estate to his wife in certain freehold property consisting of two houses in the village of C., provided as follows:—"At my wife's demise I desire that the two houses become the property of the parish priest of *U.*, on condition of paying £10 yearly to my brother's son, *P.*, and also £1 yearly for masses for the repose of the souls of the deceased members of my family. Testator died two days after the execution of the will. He was the owner in fee of the devised property. His widow died twenty-three years afterwards, on 22nd February, 1911. At that date the priest of the parish of *U.* was the third in succession in charge of the parish since testator's death. *Held* (1), that the devise of the freehold house property to the parish priest of *U.* was a charitable devise, and therefore void, as contravening the provisions of section 16 of the Charitable Donations and Bequests Act, the testator having died within three months of the date of the will; (2) that the parish priest of *U.* was a trustee for testator's nephew *P.*, in respect of the annuity of £10, and for the heir-at-law of testator as to the rest of the property. *Corcoran* v. *O'Kane.* [BARTON, J. 1

2. —— *Will—Construction—Legacy—Charity—Male religious Order bound by monastic vows—"Regular Clergy"—Power of Court to apportion between charitable and non-charitable objects.*] When trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable, the trust does not fail, and, in default of apportionment by the trustees, the Court will divide the fund equally between the objects charitable and non-charitable. A testator appointed his executor to distribute his estate of whatever nature "among the charities and hospitals (Roman Catholic) and the regular clergy—the friars of C. and W. to get the preference." *Held*, that this was a gift to three objects—(*a*) charities generally, (*b*) hospitals, and (*c*) the regular clergy, and that, the executor having made no apportionment, the general estate should be divided equally between the three, the first and second being valid charitable legacies, and the third failing as being against the policy of the 10 Geo. 4, c. 7. *Salusbury* v. *Denton* 3 K. & J. 529) applied. *Semble*, the description "regular clergy" does not by itself

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necessarily import clergy bound by monastic vows. *O'Meara* v. *Attorney-General.* M.R. 276

CHILDREN—Gift to wife for benefit of, 21, 390
See WILL. 1, 2.

CHILDREN OR REMOTER ISSUE—Taking *per stirpes* - - - - 343
See SETTLEMENT. 1.

CODICIL—Devise of real estate—Subsequent agreement for sale under Land Purchase Acts—Re-publication of will by codicil—Conversion—Ademption 292, 299
See LAND PURCHASE (IRELAND) ACTS. 3.

COMMISSIONERS OF PUBLIC WORKS—Loan—Statute of Limitations - 455
See LIMITATIONS, STATUTE OF. 5.

COMPANY—*Winding up—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *section* 215—*Misfeasance—Company purchasing its own shares—Compromise of managing director's claims*—Ultra vires—*Loss to company—Breach of trust—Statute of Limitations—Conversion—Trustee Act*, 1888 (51 & 52 *Vict. c*, 59), *section* 8 (1).] The misfeasance section (215) of the Companies (Consolidation) Act, 1908, creates no new right, and only provides, as did section 165 of the Companies Act, 1862, a summary procedure for enforcing against directors or other officers of a company liability for breach of trust or other misconduct which, prior to the Act, might have been enforced by action; and to bring a case within the section it is essential to show that pecuniary loss resulted to the company from the acts or defaults constituting the alleged misfeasance. *In re Canadian Land Reclaiming and Colonizing Company, Coventry and Dixon's Case* (14 Ch. D. 660, 668; followed; *Cavendish Bentinck* v. *Fenn* (12 A. C. 652) applied. It is *ultra vires* for a company to purchase its own shares, or to advance capital of the company to a director to do so. *Trevor* v. *Whitworth* (12 A. C. 409) applied. A *bona fide* compromise of reasonable claims made by a Managing Director against the company, by payment of a sum of money out of capital of the company, is not illegal. Where a policy-holder surrendered his policy to the Insurance Company on the terms that the amount paid to him for the surrender should be invested in shares of the company, *Held*, by Palles, C.B., affirming the decision of Barton, J., that this was a conversion within section 8, sub-section 1, of the Trustee Act of 1888, which would prevent the policy-holder, a director, from setting up the Statute of Limitations as a defence. A *bona fide* transaction with a company, impeachable only on the ground of being *ultra vires*, will be set aside only on the terms that both parties be restored to

COMPANY—*continued.*

their original rights. *In re Irish Provident Assurance Co. Limited* - - - APP. 352

2. —— *Winding up—Defaulting Irish Contributories of Company ordered to be wound up by English Court—Enforcement of English Order giving official liquidator leave to make a call—Companies (Consolidation) Act*, 1903 (8 *Edw.* 7, *c.* 69), *s.* 180, *sub-s.* 1—*Practice.*] A company registered in England was being wound up by the English Court, and an order had been made giving the Official Receiver and Liquidator leave to make a call upon the contributories of the Company. Certain Irish contributories had failed to pay the amount of the call. On an *ex parte* application, leave was given to the Official Receiver and Liquidator to enforce the order of the English Court by issuing and serving on the defaulting Irish contributories an originating summons requiring them to pay the amounts in which they were respectively in default. *In re Bank of Egypt, Limited* - - - - BARTON, J., 502

COMPULSORY PURCHASE—Price—Bonus [414
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CONDITIONS OF SALE—Lands subject to rent-charge—Sale in lots by limited owner—Apportionment of rent-charge
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CONSIDERATION—Partial failure - 95
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CONTRACT—Illegality—Public policy—Agreement for future separation 154, 422, 428
See HUSBAND AND WIFE.

—— Impossibility of performance - - 95
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CONTRACT OF SERVICE—Officers of Poor Law Union - - - - 244
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—— Pupil teachers and Monitors - - 219
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CONTRIBUTION—Mortgage—Marshalling—Subsequent mortgagee without notice
See MORTGAGE. 1. [337

CONTRIBUTORIES—Defaulting Irish, in English winding-up - - - 502
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CONVERSION—Agreement for sale under Land Purchase Acts 130, 137, 292, 299, 322
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—— Insurance Company—Director surrendering life policy on terms surrender value should be invested in shares of company—Trustee Act, 1888, s. 8, sub-s. 1 - - 352
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CONVEYANCE — Voluntary — Fraudulent — Onus of proof - - - - 512
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COSTS—Executor acting unreasonably - 470
See EXECUTOR.

—— Land Purchase Acts—Superior interest subject to rent—Redemption price of superior interest exceeding £30 and under £100 [449
See LAND PURCHASE (IRELAND) ACTS. 8.

COUNTY COUNCIL - - 63, 193
See LOCAL GOVERNMENT. 1.

COUNTY COURT—Jurisdiction to order sale in lieu of partition of holding subject to annuity to Land Commission, consent of Land Commission to partition not having been given - - - 50
See PARTITION ACTS. 1.

—— Jurisdiction to order sale in lieu of partition of statutory tenancy, consent of landlord to partition not having been given 321
See PARTITION ACTS. 2.

COVENANT—Against alienation—Consent of landlord given after alienation—Relation back - - - - - - 121
See SETTLEMENT. 2.

—— Against incumbrances—Mortgage affecting lands sold and other lands—Subsequent mortgage of the other lands—Marshalling
See MORTGAGE. 1. [337

—— For future separation - 154, 422, 428
See HUSBAND AND WIFE.

—— To settle, by tenant in tail—Voidable estate
See SETTLEMENT. 1. [343

COVENANTS—Dependent or independent 95
See PATENT.

CREDITORS—Conveyance in fraud of 512
See VOLUNTARY CONVEYANCE.

—— Specialty and simple contract—executor's right of retainer - - - 211
See ADMINISTRATION OF ASSETS. 1.

CROSS-REMAINDERS—Clause providing for, read into marriage articles - 343
See SETTLEMENT. 1.

CROWN—Servants of—Commissioners of Public Works—Loan to occupier of land—Crown debt—Statute of Limitations - 455
See LIMITATIONS, STATUTE OF. 5.

DAUGHTER — Marriage portion — Resulting trust - - - - 177, 182
See SETTLEMENT. 3.

DEATH—Land Purchase Acts—Death of vendor—Power of executors to vary terms of sale - - - - 130, 137
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DEATH—*continued.*

—— Land Purchase Acts—Death of vendor—Conversion—Ademption 130, 137, 292, [299, 522
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DEED — Construction — Lands Clauses Acts — Money lodged in Court—Words sufficient to pass - - - - 519
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DEMESNE—Sale and re-purchase—Superior interest—Redemption of—Segregation of purchase-money - - 402, 408
See LAND PURCHASE (IRELAND) ACTS. 7.

DEVISE.
See CHARITY.
See WILL.

DISENTAILING DEED—Covenant to settle by tenant in tail—Subsequent disentailing deed by covenantor of portion of lands to uses inconsistent with articles—Disentailing deed by next tenant in tail of other portion of lands - - 343
See SETTLEMENT. 1.

ELECTION—Tenant in tail put to—Hotchpot
See SETTLEMENT. 1. [343

ESTATE TAIL.
See TENANT IN TAIL.

ESTOPPEL—*Invalid exercise of power to appoint by will—Entry of tenant for life under the will—Acquisition by, of statutory title—Position of remainderman.*] Where a person enters as tenant for life under a will, which purports to be an exercise of a power to appoint lands, whether rightfully as a proper appointee, or wrongfully under a void appointment, he is not estopped from saying as against the remainderman that the devise over to him is void as being an invalid exercise of the power. *Paine* v. *Jones* (L. R. 18 Eq. 320), *In re Stringer's Estate* (6 Ch. D. 1), and *In re Anderson* ([1905] 2 Ch. 70), considered and applied. *Board* v. *Board* (L. R. 9 Q. B. 48) and *Dalton* v. *Fitzgerald* ([1897] 2 Ch. 86) distinguished. *In re Tennent's Estate* - - - WYLIE, J., 280

—— Entry under void appointment—Estoppel as regards limitations created by the appointment - - - - - - 539
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—— Mortgage—Transferee for value without notice—Negligence of mortgagor 506
See MORTGAGE. 2.
See also PATENT.

EVICTED TENANTS (IRELAND) ACT, 1907—*Compulsory purchase—Price—Estates Commissioners—Offer—Section 2, sub-section 4—Bonus.*] In estimating the amount to be offered under the

EVICTED TENANTS (IRELAND) ACT, 1907—*continued.*

Evicted Tenants (Ireland) Act, 1907, for the compulsory acquisition of lands, the bonus which may possibly be payable in respect of the sale is not to be taken into consideration. *In re Grant's Estate* [App. 414

EVIDENCE—Onus of proof—Voluntary conveyance—Fraudulent conveyance 512
See Voluntary Conveyance.

EXECUTOR—*Liability for acting unreasonably—Vexatious and unjustifiable conduct—Costs thereby incurred.*] A testator devised his house and lands of *D.*, which were registered under the provisions of the Local Registration of Title (Ireland) Act, 1891, to *H. A. W.*, subject to the right of the testator's wife to reside in certain rooms of the house, and on the condition that *H. A. W.* should reside in the house; should *H. A. W.* not reside in the house at *D.*, the testator devised the house and lands to *J. W.* on like conditions, and he appointed *H. A. W.* and *J. W.* his executors, who proved the will. *H. A. W.* was a merchant carrying on business in the town of *E.*, where, at the time of the testator's death, he resided with his family; and *J. W.* resided in England. There was evidence that after the testator's death *H. A. W.* usually slept in the house at *D.* and worked the lands, driving in each day to *E.* (distant about seven miles), where he continued to carry on his business. In the course of the administration of the testator's estate, *J. W.* required *H. A. W.* to give satisfactory evidence that he had complied with the condition in the will as to residence at *D.*, which *H. A. W.* refused to do, save by alleging that he had done so, and was residing there. *H. A. W.* subsequently died, and *J. W.* refused to sign an assent to the devise, or to join in a conveyance of the lands to a purchaser, alleging that the conditions of the will had not been complied with. The present action was then brought against *J. W.* by the executors of *H. A. W.*, claiming a declaration that the latter was in his lifetime rightly in possession of the lands of *D.*, an order that *J. W.* should do all acts necessary to have the plaintiffs registered as owners under the Local Registration of Title (Ireland) Act, 1891, and claiming costs against *J. W.*; whereupon the latter offered to do whatever was necessary in his capacity of surviving executor to assent to the devise to *H. A. W.*, on his being paid his proper charges and expenses. The plaintiffs, however, claimed that *J. W.* was bound to indemnify them against the costs already incurred in the action, with which they proceeded. *Held*, by the Court of Appeal (The Right Hon. Redmond Barry, C., and Holmes, L.J., Cherry, L.J., dissenting), reversing the order of the Rt. Hon. R. E. Meredith, M.R., that the action of *J. W.* in refusing to assent to the devise was not unreasonable, and that he was entitled to his costs of the action. *Martin* v. *Wilson* - - - - - - - [App. 470

—— Land Purchase Acts—Purchase agreement—Death of vendor—Power of executors to vary terms of sale - - 130, 137
See Land Purchase (Ireland) Acts. 5.

—— Retainer—Specialty and simple contract creditors—Hinde Palmer's Act - 211
See Administration of Assets. 1.

—— Retainer—Payment into Court—Two estates being administered in one action—Transference of fund from one estate to the other - - - - - - 381
See Administration of Assets. 2.

EXECUTORY DEVISE—Devise over on a contingency—Restricted to time prior to period of distribution - - 214
See Will. 4.

FORTUNE—Trust of fund as portion or fortune of daughter on marriage—Resulting trust - - - - 177, 182
See Settlement. 3.

FRAUD—Innocent third parties—Which must suffer - - - - - 506
See Mortgage. 2.

FRAUDULENT CONVEYANCE—Intent to defeat creditors or subsequent purchasers—Onus of proof - - - 512
See Voluntary Conveyance.

GENERAL WORDS—Words in deed sufficient to pass money in Court - - 519
See Lands Clauses Acts.

HEIR-AT-LAW—— Hotchpot - - 343
See Settlement. 1.

—— Trust for - - - - - - 1
See Charity. 1.

HINDE PALMER'S ACT—Executor's right of retainer—Specialty and Simple Contract Creditors - - - - - 211
See Administration of Assets. 1.

HOTCHPOT—Real estate—Eldest son taking estate - - - - - - 343
See Settlement. 1.

HUSBAND AND WIFE—*Contract—Public policy—Separation deed—Agreement providing for immediate reconciliation and for the contingency of future separation.*] An agreement entered into between a husband and a wife while living separate and apart, providing for their resuming habitation, and further that in the event of a future separation no provision should be made for the wife,

HUSBAND AND WIFE—*continued.*
is legal and enforceable. Decisions of the Master of the Rolls in *MacMahon* v. *MacMahon*, [1913] 1 I. R. 154, and of Ross, J., in *Purser* v. *Purser*, [1913] 1 I. R., 422, affirmed. *MacMahon* v. *MacMahon*. *Purser* v. *Purser*. [APP. 428

IGNORANCE OF LAW—Poor rate not deducted for a number of years - 25
See POOR RATE.

ILLEGALITY—Agreement between husband and wife for future separation 154, 422, 428
See HUSBAND AND WIFE.

IMPOSSIBILITY—Substantial part of contract becoming impossible of performance 95
See PATENT.

INDEMNITY—Conveyance "free from incumbrances" of portion of lands subject to a charge—Right of indemnity against remaining portion—Subsequent purchaser for value—Marshalling - - 337
See MORTGAGE. 1.

INFANT—Person entering on lands of—Possession as bailiff—Duration of relationship - - - - - - 395
See STATUTE OF LIMITATIONS. 4.

—— Voluntary conveyance of lands—Trusts for infants—Subsequent purchaser for value—Onus of proving voluntary conveyance made *bona fide* - - - - 512
See VOLUNTARY CONVEYANCE.

INNOCENT PARTIES—Which must suffer from fraud of third party - - 506
See MORTGAGE. 2.

INVESTMENT—By trustees—Purchase of freeholds - - - - - - 69
See TRUSTEES.

ISSUE—Eldest male issue—*nomen collectivum* 143
See WILL. 3.

—— Taking *per stirpes* - - - 343
See SETTLEMENT. 1.

JOINDER OF ATTORNEY-GENERAL—Resolution of County Council approving of defective proposal by Rural District Council to make a road—Action by ratepayer - - - - - - 63, 193
See LOCAL GOVERNMENT: 1.

JUDGMENT MORTGAGE—Registered against undivided share in holding subject to annuity to Land Commission—Jurisdiction to order sale in lieu of partition, consent of Land Commission not having been given to partition - - 50
See PARTITION ACTS. 1.

JURISDICTION—Of Chancery Division or County Court to order sale in lieu of partition of holding subject to annuity to Land Commission, consent of Land Commission to partition not having been given - - - - - - 50
See PARTITION ACTS. 1.

—— To order sale in lieu of partition of statutory tenancy, consent of landlord to partition not having been given - - 321
See PARTITION ACTS. 2.

—— Of Land Judge to enforce specific performance of contract for sale of settled land - - - - - - 165
See LAND JUDGE.

LAND JUDGE—*Jurisdiction—Vendor and purchaser—Contract for the sale of settled land—Specific performance—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *s.* 45—*Landed Estates Court Act*, 1858 (21 & 22 *Vict. c.* 72), *ss.* 46, 47, 48.] Section 46 of the Landed Estates Court Act, 1858, enables a limited owner to have his title investigated and a conveyance made by the Court, but does not confer on the Court jurisdiction to enforce specific performance of a contract for the sale of settled land. Sections 47 and 48 deal with the case of an absolute owner of land, and have no application to that of a limited owner *In re Browne's Estate* - - Ross, J., 165

LAND PURCHASE (IRELAND) ACTS—*Arrears of rent not exceeding one year—Insolvent estate—To whom arrears payable—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 24, *sub-s.* 8.] Where upon the sale of a settled estate through the Irish Land Commission arrears of rent are due to the vendor (tenant for life) at the date of the purchase agreements, the sum payable in respect of those arrears under section 24, sub-sect. 8, of the Irish Land Act, 1903, is a sum earmarked and distinct from the rest of the purchase-money, and is payable to the vendor, notwithstanding that the rest of the purchase-money is insufficient to meet the claims of incumbrancers thereon. *In re O'Ferrall's Estate* - - Ross, J., 17

2. —— *Bonus—Estate for sale solvent as to the fee, but insolvent as to subsisting life estate—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *section* 48 (1).] An estate sold under the Land Purchase Acts was solvent as to the fee, but insolvent as to the life estate of the vendor: *Held*, that the estate was so encumbered that the vendor was not entitled to receive for his own use any part of the rents or profits thereof, within the meaning of the proviso to section 48 (1) of the Irish Land Act, 1903, and that the bonus should be added to the purchase-money, and not paid to the vendor. *In re Nunn's Estate* - - - - - Ross, J., 411

LAND PURCHASE (IRELAND) ACTS—*continued.*

3.—*Conversion—Ademption—Devise of real estate by landlord—Purchase agreements subsequent to devise—Republication of will by codicil—Death of landlord—Subsequent sanction of advance—Irish Land Act*, 1903, *section* 16, *sub-s.* 1.] A testator, who was the absolute owner of real estates in Kildare and Dublin, by his will, executed in 1899, devised these estates to *R. B. S.* for life, with remainder to his first and other sons in tail male, with remainders over, and appointed *J. T. S.* his residuary legatee. On the 1st of January, 1906, the testator signed purchase-agreements with thirty-one of the thirty-six tenants occupying holdings on his Kildare estate, for the sale to them of their holdings under the Irish Land Act, 1903, and on the 31st January, swore an affidavit verifying an originating application to the Estates Commissioners to have his entire Kildare estate declared fit to be regarded as a separate estate. On the 1st February, 1906, the testator signed purchase-agreements with the five tenants occupying holdings on his Dublin estate. On the 7th February, 1906, the testator executed a codicil to his will, whereby he appointed a new executor, and expressly confirmed his will in other respects. The testator died on the 23rd May, 1906, having in the interval between the execution of the codicil and his death signed further purchase agreements with three of the five remaining tenants on his Kildare estate. The Estates Commissioners did not sanction the advance of the purchase-moneys for the two estates until after the death of the testator. *Held*, by the Court of Appeal (affirming the decision of Barton, J.) that the codicil effected a republication of the will, that the testator intended his interest in the lands devised to pass to *R. B. S.*, and that the latter was entitled to a life estate in the purchase-moneys of the lands contracted to be sold by the testator in his lifetime, with remainders as provided by the will. *Quære*, whether, having regard to the provisions of section 16 of the Irish Land Act, 1903, the signing of agreements for sale of lands under that Act can operate as a conversion of lands devised by a will executed by the vendor prior to the date of the agreements, so as to create a specific devise. *In re Sherlock's Estate* ([1899] 2 I. R. 581, 591) and *In re Doyle's Estate* ([1907] 1 I. R. 261) considered. *Steele* v. *Steele*.

[Barton, J., 292. Apr. 269.

4.—*Conversion — Sale by absolute owner — Death of, prior to Vesting Order — Claim to proceeds of purchase money as between real and personal representatives — Conversion — Land Law (Ireland) Act*, 1887 (50 & 51 Vict. c. 33), s. 14, *sub-s.* 1 — *Irish Land Act*, 1903 (3 Edw. 7, c. 37), s. 44, *sub-s.* 1, *s.* 24, *sub-s.* 1.] Where an absolute owner of lands, who has entered into agreements for the sale thereof under the Land Purchase Acts, either to his tenants direct or to the Land Commission, dies prior to the vesting of the lands in the purchaser, the claim which attaches to the purchase-money under the order attaching claims, made pursuant to the provisions of s. 14, sub-s. 1, of the Land Law (Ireland) Act, 1887, and s. 24, sub-s. 1, of the Irish Land Act, 1903, or s. 16, sub-s. 1, of the Irish Land Act, 1903, as the case may be, is the claim of the personal representative of the vendor to payment of the residue of such purchase-money, and not the claim of his devisee, where he has devised the lands, or of his heir-at-law, where he dies intestate. *Steele* v. *Steele* ([1913] 1 I. R. 292, 299) considered. *In re Croker's Estate*. . . . Wylie, J., 522

5. —— *Death of Vendor after purchase agreement—Variation in terms of sale—Executors of vendor—Powers of executors—Conversion—Ademption—Conveyancing and Law of Property Act*, 1881, *sect.* 4.] *A* devised freehold lands to *B*, which were in the occupation of agricultural tenants. In 1905, *A* entered into a joint agreement in form "G", with all her tenants, ten in number, for the sale to them under the provisions of the Irish Land Act, 1903, of the fee-simple of their holdings. *A* died in 1907, without having altered her will. In 1909 the Estates Commissioners made an order declaring all the lands comprised in the agreement fit to be regarded as an estate, but subsequently refused to sanction the advance of the purchase-money in the case of one of the holdings. On the hearing of a memorandum from the Estates Commissioners, *held* by the Court of Appeal (reversing the decision of Wylie, J., that the executors of the vendor had no power to vary the terms of the sale of the estate, and that as *B*, the devisee of the lands, refused to consent to the exclusion of the holding in respect of which the Estates Commissioners refused to advance the purchase-money, the entire sale fell through. *In re Fanaemor's Estate* - - Wylie, J., 130; Apr. 137

6. —— *Limitations on advances to tenant-purchasers—Prior advance redeemed—Computation of, on application for subsequent advance—Irish Land Act*, 1903 (3 Edw. 7, c. 37), s. 44, *sub-s.* 1.] A tenant applying for an advance under the Land Purchase Acts, in pursuance of an agreement entered into after the passing of the Irish Land Act, 1903, [illegible] claim such a sum as, when added to any previous advances obtained by him, will be within the limits prescribed in section 44, sub-s. 1, of the said Act, and it is immaterial whether the prior advances were made before or after the

LAND PURCHASE (IRELAND) ACTS—*continued.*

passing of the said Act. In computing the amount of advances for the purpose of section 15, sub-s. 1, the original amount of a prior advance must be reckoned, whether entirely redeemed or not. *In re Sweetman's Estate* - - WYLIE, J., 80

7. —— *Superior interest — Redemption of — Demesne—Sale and re-purchase — Segregation of purchase-money of demesne—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *sections* 3, 16 (1). *A*, the owner of a demesne composed of parcels held under different titles, and free from incumbrances, agreed with the Land Commission for the sale and re-purchase of the demesne under the provisions of section 3 of the Irish Land Act, 1903. Part of the demesne consisted of the lands of *K.*, held under two leases for lives renewable for ever, the rents reserved by them being paid in one sum of £47 11*s.* 9*d.* The Estates Commissioners apportioned the purchase-money of the demesne, which amounted to £17,895, between the various parcels of the demesne, and fixed the sum of £498 as representing the selling value of the lands of *K.* *B*, the owner of the said rent of £47 11*s.* 9*d.*, issuing out of the lands of *K.*, was not represented before the Estates Commissioners when the said sum of £498 was fixed, and was, in fact, unaware of the sale of the demesne, until the sale was approaching completion. The said sum of £17,895 was sufficient for the redemption of all superior interests, leaving a large balance available for *A.* The redemption price of the rent of £47 11*s.* 9*d.* was fixed at £1140 by Mr. Justice Wylie, who, however, held that there was no jurisdiction to pay to *B.* out of the purchase-money of the demesne any larger sum than the £498 representing the selling value of the lands of *K.*, out of which the rents issued. *Held*, by the Court of Appeal (reversing the decision of Wylie, J.), that under the circumstances of the case there was no occasion to apportion the purchase-money of the demesne, and that the redemption price of £1140 was a charge on all the purchase-money of the demesne. *In re Athlumney's Estate.*

[WYLIE, J., 402; APP. 408.

8. —— *Superior interest — Redemption of — Impropriate tithe rentcharge subject to a rent or annual sum—Redemption-price of apportioned part of tithe, exceeding* £30 *and under* £100—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *section* 63, *sub-section* 2 — *Application of—Costs.*] Where impropriate tithes, payable out of lands sold under the Land Purchase Acts and other lands, are subject to a rent, and the redemption-price of the apportioned part of the tithes, payable out of the lands so sold, exceeds £30, but does not exceed £100, the vendor, notwithstanding the fact that he has notice of the existence of the rent, has a *prima facie* right to have such redemption-price paid out to the person in possession or in receipt of the income of the tithes, pursuant to the provisions of section 63, sub-sect. 2, of the Irish Land Act, 1903, and to be freed from all costs incidental to the payment out thereof, except such costs as are properly payable in respect of the affidavit and undertaking required for such payment out. *In re Armstrong's Estate.* - - - - WYLIE, J., 449

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—— Bonus—Compulsory purchase under Evicted Tenants Act, 1907—Taking bonus into consideration in estimating price 414
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—— Bonus—Insolvent estate—Absolute order for sale — Mortgagee in possession during pendency of petition - - 91
See LIMITATIONS, STATUTE OF. 3.

—— Partition — Sale in lieu of — Tenancy in common in lands subject to annuity to Land Commission—Jurisdiction of Chancery Division or County Court - 50
See PARTITION ACTS. 1.

—— Turbary—Right of allotment by owner of bog - - - - - 8
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LANDLORD AND TENANT — Statutory tenancy—Owner of undivided share—Jurisdiction of Chancery Division or County Court to order sale in lieu of partition where consent of landlord to partition not given - - - 321
See PARTITION ACTS. 2.

LANDS CLAUSES ACTS—*Deed — Construction — Money lodged in Court — Words in deed sufficient to pass—"Situate"—General words—Mortgage—Disentailing deed—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 69—*Railways (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 70), *s.* 18.] *X* was tenant in tail in remainder, under an indenture of settlement made in 1870, of considerable estates in Galway and in other parts of Ireland. In 1890 a railway company acquired a small portion of the Galway lands under their compulsory powers, and the compensation money was lodged and remained in Court. In 1901, *X* mortgaged his estates by several instruments in which they were variously described as "all my estates in Galway and wheresoever situate in Ireland," "all my estate situate in Galway and elsewhere in Ireland," and "all my lands, hereditaments, and premises in County Galway, Ireland, and other lands, hereditaments, and premises wheresoever situate in Ireland." *X*

was adjudicated a bankrupt in England in 1902; and the estate tail in remainder given to him by the settlement having subsequently become an estate in possession, the official receiver and trustee of his estate duly executed a disentailing assurance of the lands comprised in and settled by the indenture of settlement of 1870, "and all other, if any, the tenements and heriditaments of or to which the said *X* was seised or entitled as tenant in tail, whether at law or in equity, under the said indenture or otherwise howsoever." Upon a summons by the Official Receiver in Bankruptcy for payment out of Court of the compensation moneys, which was opposed by the mortgagee: *Held*, (1) that the compensation moneys were not included in the mortgage; (2) that they were included in the disentailing assurance, and should be paid out to the Official Receiver in Bankruptcy. *Ex parte Ballinrobe and Claremorris Light Railway Co. and Kenny.* - - - BARTON, J., 519

LIMITATIONS, STATUTE OF—*Personal action — Lunatic — Arrears of maintenance — Whether debt or charge on personal estate—Common Law Procedure Act (Ireland)*, 1853 (16 & 17 *Vict. c.* 113), *s.* 20—*Lunatic Asylums (Ireland Act*, 1875 (38 & 39 *Vict. c.* 67), *s.* 16.] Arrears of maintenance of a lunatic in an asylum are an ordinary debt of the lunatic, to which the Statute of Limitations applies. *Re O'Grady's Estate*; *O'Grady* v. *Young* (15 Ir. L. T. R. 45) not applied. *Prendergast* v. *Murphy.*

BARTON, J., 504

2.——*Mortgagor and mortgagee — Claim for account and recovery of rents by second mortgagee against first mortgagee.*] The second mortgagee of lands claimed an account against the first mortgagee of all rents and profits of the lands received by the first mortgagee after the first mortgagee had been satisfied, and repayment by the first mortgagee of any surplus of rents in his hands, and a re-conveyance of the lands. The first mortgagee, who had ceased to be in possession of the lands and in receipt of the rents and profits thereof for more than six years previous to action brought, pleaded section 20 of the Common Law Procedure Act (16 & 17 Vict. c. 113) as a bar to the action. *Held*, that the action, being one for redemption and other appropriate remedies, was not barred by the section pleaded. *Ocean Accident and Guarantee Corporation, Limited, and Hewitt* v. *Collum and Archdall* - - - ROSS, J., 328

3.——*Realty—Absolute order for Sale—Mortgagee in possession during pendency of petition—Insolvent estate—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *sect.* 48 (4) Mortgagees having carriage of proceedings in the Land Judge's Court cannot enter into the possession of the lands for sale in the matter, and on the dismissal of the petition set up such possession as giving them a title under the Statutes of Limitation against the mortgagor. During the pendency of the proceedings they hold as trustees for all persons interested in the lands. Two absolute orders for the sale of *B*'s insolvent estate were, in 1881, made by the Land Judge, on the petitions of the mortgagees and of the owner. The mortgagees' petition was abandoned, but not dismissed till 1912. In 1882 a Court receiver was appointed over the lands. In 1894 the Court receiver was discharged, and a receiver appointed over the lands by the mortgagees having carriage of the sale. In 1898 the mortgagees appointed their receiver to be their agent and attorney, and went into possession of the lands as mortgagees in possession. In 1907 the owner's petition was dismissed, and the mortgagees proceeded to sell the lands to the tenants under the Irish Land Act, 1903, and sought to make title to the lands as absolute owners. *Held*, that time would not run in favour of the mortgagees until the date of the dismissal of the petition for sale, and that, the estate for sale being the insolvent estate of *B*, no bonus was payable. *In re Life Association of Scotland's Estate* - - - ROSS, J., 91

4.——*Adverse possession — Mother entering as bailiff—Purchaser with notice of infant's rights—Demand of possession by infant on attaining age—Real Property Limitation Act*, 1874, *s.* 3—*Notice—Vendor and Purchaser.*] A person entering upon an infant's estate with notice of the infant's rights becomes his bailiff. *Quinton* v. *Frith* (I. R. 2 Eq. 396) followed. A person who by so entering into possession of an infant's estate makes himself a bailiff of that estate, continues to be such bailiff notwithstanding the infant's coming of age, until the relationship is dissolved by some other circumstance or combination of circumstances. A demand of possession by the infant will be such a circumstance, but, if made within six years before action brought, it affords no defence under sect. 3 of the Real Property Limitation Act, 1874. *MacMahon* v. *Hastings* - - - - M. R. 395

5.——*Commissioners of Public Works—Loan to occupier—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *section* 31 (2)—*Landed Property Improvement (Ireland) Act*, 1847 (10 & 11 *Vict. c.* 32)—*Servants of the Crown—Crown debt.*] A loan made to an occupier of land by the Commissioners of Public Works acting in execution of the Land Law (Ireland) Act, 1881, sect. 31 (2), and the provisions of the Landed Property Improvement (Ireland) Acts, made applicable thereto by Treasury Minute, is not a Crown debt, and may be

LIMITATIONS, STATUTE OF—*continued.*
barred by lapse of time by the Statute of Limitations. *Attorney-General* v. *Howley* - M.R. 455

6.——*Equitable charge on lands appointed in certain shares—One share purchased by the tenant for life of the lands, and portion thereof assigned over by him—Interest paid on the other shares from death of tenant for life and also on the portion of the share so assigned over, but not on the remaining portion thereof—Claim to the latter barred—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8. Certain shares in an equitable charge of £20,000 were appointed, pursuant to a power contained in marriage articles, to the daughters of the marriage, and were by them assigned to the trustees of their respective settlements. £8000, the share appointed to one of the daughters, was afterwards paid off by *J. P.*, the father, who was at the time tenant for life of the lands subject to the charge, and was assigned to him for his own benefit. Subsequently *J. P.* assigned £3001, portion of this sum of £8000, to the trustees of the settlement of another of the daughters. On his death in 1877 the entire charge became raisable. Since that time interest had been regularly paid on the other appointed shares and also on the £3001, but no payment on foot of principal or interest had been made since that time, or acknowledgment given, in respect of the £4999 the balance of the said sum of £8000. *Held*, that the claim to the £4999 was barred. *Young* v. *Lord Waterpark* (8 L. J. Ch. 214) distinguished. *In re Power's Estate.*
[WYLIE, J., 530

—— Insurance Company — Director surrendering life policy on terms surrender-value should be invested in shares of Company — Conversion—Trustee Act, 1888, s. 8, sub-s. 1. - - - - 352
See COMPANY. 1.

—— Marriage Settlement — Annuity to wife in case she should survive her husband, or in case he should become bankrupt during her life — Independent annuities — One barred by Statute of Limitations, the other not - - - - - 121
See SETTLEMENT. 2.

—— Mortgage of portion of lands subject to a charge — Right to make other portion contribute not barred by Statute - 337
See MORTGAGE. 1.

—— Power of Appointment—Entry on lands by tenant for life under valid or invalid appointment — Acquisition of statutory title—Estoppel as regards remainderman
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LIMITATIONS, STATUTE OF—*continued.*
—— Power of Appointment—Invalid exercise—Power to be exercised by ante-nuptial settlement with consent of trustees — Post-nuptial settlement executed without such consent, and in ignorance of power —Possession under invalid appointment —Statute of Limitations - - 539
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LIMITED OWNER - - - 125
See SETTLED LAND ACTS.

LOCAL GOVERNMENT—*County Council procedure—Proposal to make road—Necessity to include in proposal term for repayment of loan—Statutory rule—"Shall"—Mandatory or directory—Right of ratepayer to restrain Council — Joinder of Attorney-General — Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *section* 60 — *Local Government (Procedure of Councils) Order* 1899, *Article* 13 — *Right of County Council to rescind resolution.*] The plaintiff, a farmer and ratepayer in the Rural District of Enniskillen, sought an injunction to restrain the County Council and the said Rural District Council from acting on a resolution approving of a proposal of the Rural District Council to make a new road. The proposal formulated by the Rural District Council, and approved of by the County Council, did not embody any decision as to the number of years within which the money proposed to be borrowed should be paid off, pursuant to Article 13 (2) *a* of the Privy Council Order of 30th January, 1899. *Held*, by the Court of Appeal (reversing the decision of Ross, J.), that the plaintiff was not legally competent to sustain the action without the joinder of the Attorney-General, and that the action ought to be dismissed. *Held*, by Palles, C. B., and Holmes, L. J. (agreeing with the decision of Ross. J.), that Article 13 (2) *a* was valid, and consistent with section 60 of the Local Government Act, 1898, and that the proposal formulated by the District Council was accordingly defective and inoperative by reason of the aforesaid omission. The County Council, by resolution of January 13th, approved of the proposal; by resolution of February 24th, rescinded the resolution of January 13th; and by resolution of May 15th, rescinded that of February 24th. *Held*, by Ross, J., that the County Council, in the absence of standing orders to the contrary, had power to rescind the prior rescinding resolution. *Weir* v. *Fermanagh County Council and Enniskillen Rural District Council* Ross, J. 63; APP. 193

2. —— *Urban sanitary authority—Supply of water for domestic purposes—Post Office premises not on valuation list and not rated—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *sections*

LOCAL GOVERNMENT—*continued.*
44, 49, 50, 53.] Section 53 of the Waterworks Clauses Act, 1847, provides as follows: "Every owner and occupier of any dwelling-house or part of a dwelling-house . . . . shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water-rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes." The plaintiff, who was the occupier of premises used as a post office within the district supplied by the defendants, which premises were not entered on the valuation list and were not rated, demanded a supply of water for domestic purposes, but did not strictly comply with all the regulations made by the defendants, and was unable to agree with the defendants as to the proper amount to be paid by them for the water-supply. *Held*, that the premises not being rated, the defendants could not insist on prepayment of water-rate by the plaintiff as a condition precedent to their supplying the plaintiff with water, and that the plaintiff was entitled to a supply of water for domestic purposes as of right, subject to his complying with the requirements of the rules and regulations of the defendants, and on payment of the value of the water supplied, which value should, if necessary, be ascertained in Chambers. *Postmaster-General* v. *Nenagh Urban District Council* Ross, J., 238

LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891—Power to rectify register - - 31, 218
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See also EXECUTOR.

LOST DEED—Presumption of—Poor rate not deducted for many years - 25
See POOR RATE.

LUNATIC—Arrears of maintenance—Debt or charge—Statute of Limitations 504
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MAINTENANCE—Arrears of—Lunatic—Debt or charge - - - - - - 504
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MANDATORY OR DIRECTORY — Word "shall" - - - - - - - 63
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MARSHALLING - Conveyance "free from incumbrances" of portion of lands subject to a charge—Subsequent mortgage of remaining portion to mortgagee without notice - - - - - - 337
See MORTGAGE. 1.

MISFEASANCE—Director - - 352
See COMPANY. 1.

MISTAKE—Poor-rate not deducted for number of years under mistake of law - 25
See POOR RATE.

MONASTIC VOWS — Description "Regular Clergy" does not necessarily mean clergy bound by monastic vows 276
See CHARITY. 2.

MONEY LODGED IN COURT—Words in deed sufficient to pass - - 519
See LANDS CLAUSES ACTS.

MONITOR—Contract of service - - 219
See NATIONAL INSURANCE ACT, 1911. 2.

MORTGAGE—*Conveyance of portion of mortgaged lands "free from incumbrances" — Right of indemnity — Notice — Indemnifying lands mortgaged without notice—Right of contribution—Marshalling —Statute of Limitations*—3 & 4 *Wm.* 4, *c.* 27, *s.* 42; 16 & 17 *Vict. c.* 113, *s.* 20.] If the owner of lands *A* and *B*, on which a charge exists, conveys lands *A* for value, and gives a covenant that the lands are "free from incumbrances," the purchaser is entitled to throw the charge on lands *B*, so long as lands *B* remain in the hands of the mortgagor or of volunteers under him, but the equity ceases on a conveyance of lands *B* to a purchaser for value without notice. The owner of lands *A* and *B*, subject to an annuity and a mortgage, conveyed lands *A* for value, with a covenant that the lands were free from incumbrances. He subsequently mortgaged lands *B* to a mortgagee without notice of the conveyance. *Held*, that the mortgagee of lands *B* was entitled to make lands *A* contribute rateably with lands *B* towards the payment of the superior charges. *Held*, also that the claim to such contribution was not barred by s. 42 of the Real Property Limitation Act, 1833, or s. 20 of the Common Law Procedure (Ireland) Act, 1853. *Ocean Accident and Guarantee Corporation, Limited, and Hewitt* v. *Collum*
[Ross, J., 337

2. —— *Transfer—Transferee for value without notice—Negligence of mortgagor—Fraud of mortgagee—Equities as between mortgagor and transferee — Two innocent parties — Which must suffer from fraud of third party?—Estoppel.*] *A*, a solicitor, in the year 1897, mortgaged certain property to *P*, to secure a sum of £600. In the year 1905 *P* advanced a further sum of £317 to *A*, and a new mortgage was executed for the sum of £917, of the lands subject to the mortgage of 1897 and additional lands. This mortgage contained no reference to the mortgage of 1897, nor was the deed effecting that mortgage handed over to *A*, it being alleged by *P* to have been lost. In 1907 *P*

MORTGAGE—*continued.*

transferred the 1905 mortgage to himself and H, as joint trustees of a trust fund, by way of sub-mortgage to secure a sum of £1500, the circumstances being such as to constitute *P* and *H* transferees for value. The principal sum of £917 was then due on foot of the mortgage of 1905, and *H* had no notice of the mortgage of 1897. *A* acted as *P*'s solicitor in connexion with the transfer, and approved of the transfer deed. In 1908, *P* transferred the mortgage of 1897 to a bank, which subsequently realized the amount. The sub-mortgage of 1907 was afterwards transferred to *H* and *M*, as the then trustees of the trust fund, and they instituted the present proceedings for a sale of the lands comprised in the mortgage of 1905, alleging that the sum of £917 was due on foot of such mortgage. *A* claimed to be entitled to credit in respect of the moneys realized on foot of the mortgage of 1897. *Held*, that in consequence of *A* having left the mortgage of 1897 outstanding in the hands of *P*, it was not open to *A* to say that the whole amount secured by the mortgage of 1905 was not due. *In re Ambrose's Estate*

[Ross, J. 506; Aff. C.A.

—— Account — Claim for, by second mortgagee against first mortgagee who had ceased to be in possession for more than six years - - - - - - 328
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—— Judgment mortgage — Registered against interest in undivided share of holding subject to annuity to Land Commission
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NATIONAL EDUCATION (IRELAND) ACT.
See NATIONAL INSURANCE ACT, 1911. 2.

NATIONAL INSURANCE ACT, 1911—*Officers of poor law union—Employment—Contract of service*—1 & 2 *Geo.* 5, *c.* 55, *section* 1, *sub-sections* (1), (2); *section* 66, *sub-section* 1 (iii); *First Schedule, Part I.* (*a*), *Part II.* (*b*).] Officers of a poor law union are not employed under a contract of service within the meaning of Part I. of the first Schedule of the National Insurance Act, 1911. *In re National Insurance Act*, 1911. *The Case of the Officers of South Dublin Union.*

[M. R. 244

2. —— *Pupil Teachers and Monitors—Contract of service—National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *s.* 1, *sub-ss.* 1, 3, *s.* 66, *sub-s.* 1 (iii.), *First Schedule, Part* I (*a*)—*National Education (Ireland) Act.*] The employment of pupil teachers and monitors in National Schools in Ireland is an employment within the meaning of the

NATIONAL INSURANCE ACT, 1911—*continued.*

National Insurance Act, 1911, and the Commissioners of National Education are the employers. It is not a contract of apprenticeship, because an essential element of apprenticeship—the right to receive instruction—is absent from the contract; but is a contract of service within the meaning of Part I., section 1, of the National Insurance Act, 1911. *In re National Insurance Act*, 1911. *The Case of Pupil Teachers and Monitors.*

[BARTON, J., 219

NATIONAL SCHOOLS—Pupil Teachers and monitors—Contract of Service - 219
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NEGLIGENCE—Of mortgagor, enabling fraud to be committed by mortgagee—Rights of transferee for value - - - 506
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ORDERS—Local Government Board—Procedure of Councils Orders, 1899, Article 13 63,
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PARTITION ACTS—*Partition Acts*, 1868 (31 & 32 *Vict. c.* 40), *s.* 3; 1876 (39 & 40 *Vict. c.* 17), *s.* 7—*Jurisdiction of Chancery Division and County Court—Tenant purchasers—Vesting order registered subject to equities—Annuity to Land Commission in existence—Tenancy in common in purchased holding—Judgment registered as mortgage against interest of one of several co-owners—Equity civil bill seeking sale in lieu of partition—Consent of Land Commission to partition whether a condition to a decree for sale—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 30 (1) *a*—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 54 (1) (*a*).] A judgment mortgagee of the share of one of several co-owners of a holding, purchased under the Land Purchase

PARTITION ACTS—*continued.*

Acts, subject to an existing annuity payable to the Land Commission, may obtain, under the Partition Acts, an order for sale of the whole without the consent of the Commission to a partition. *Farrell* v. *Donnelly* - - - - - - - APP. 50

2. ——*Statutory tenancy—Owner of undivided share—Jurisdiction of Chancery Division and County Court to order sale in lieu of partition—Consent of landlord to a partition not a condition precedent to the institution of a suit for partition—Consent to a Sale—Partition Acts*, 1868 (31 & 32 *Vict. c.* 40), *section* 3; 1876 (39 & 40 *Vict. c.* 17), *section* 7—*Land Law* (*Ireland*) *Act* 1881 (44 & 45 *Vict. c.* 49), *section* 5, *sub-sect.* 3.] In an equity suit by an owner of an undivided share in a holding held for a statutory term, brought against the owner of the other shares, seeking for a sale in lieu of partition, the Court has jurisdiction to order such sale, notwithstanding that the landlord has not given his consent to a partition. *Prendergast* v. *Mongan*.

[DODD, J., 321

PATENT—*Action for royalties—Construction of licence—Licensee estopped from disputing novelty of patent—Lapse of patent by non-payment of fees—Implied covenant by patentee to pay fees—Dependency of covenant to pay royalties—Impossibility of performance of substantial part of contract.* A patentee of improvements for making re-inforced concrete, called the Cummings system, patented in the United Kingdom, France, and Austria, respectively, granted the exclusive right to work the patents during the full terms for which they were granted; the licensee expressly admitted the validity of the patents and agreed to pay a royalty of 2½ per cent. on the total amount included in every contract for work executed on the Cummings system, and a minimum amount of 5000 dollars each year during the continuance of the agreement. The patentee agreed to protect the patents against infringement, and to defend any proceedings brought against the licensee for the infringement of other patents. There was no provision as to payment of the renewal fees. The patentee did not pay the renewal fees on the French and Austrian patents, and they lapsed owing to the non-payment. The licensee worked the invention in England only, and without success. The licensee paid the minimum royalty at first, but declined to pay at the end of the third year, and an action was brought by the patentee to recover the amount then due. The defendant resisted the claim on the ground (1) of want of novelty of the invention; (2) that under the agreement the plaintiff was bound to pay the renewal fees, that, owing to his failure to pay the fees in France and Austria, the patents in those countries lapsed, and that the lapse of the patents relieved the defendant from liabilty to pay the royalty. The defendant counter-claimed for a declaration that the agreement was not binding, and for a return of £52 12*s.* 9*d.*, paid under a mistake. The plaintiff contended (1) that the agreement imposed no obligation on him to pay the fees; and (2) that even if it did, the breach of the agreement by him in that respect was no defence to the action, but only gave a right to damages to be recovered on a counter-claim; and (3) that as the United Kingdom patent remained valid, there was at most a partial failure of consideration, which did not release the defendant from his agreement to pay the royalty. *Held* (1) That the defence of want of novelty was not open to the defendant; (2) that there was an implied covenant by the plaintiff to pay the renewal fees; (3) that the covenant to pay the royalties was not an independent covenant, but dependent on the performance by the plaintiff of the implied covenant to pay the fees; (4) that, owing to the lapse of the foreign patents, a substantial part of the subject-matter of the agreement was destroyed, and the agreement in a substantial part became impossible of performance and ceased to be binding; and (5) that as the royalty was a fixed sum, the consideration was indivisible, and the failure of part was equivalent to failure of the entire. *Mills* v. *Carson*, 10 R. P. C. 9, distinguished: *Lines* v. *Usher*, 14 R. P. C. 206, followed. *Cummings* v. *Stewart* (No. 2) - - - - - - - M.R. 95

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PETITION FOR SALE—Absolute order—Mortgagees having carriage of sale in possession—Petition dismissed—Statute of Limitations - - - - 91
See LIMITATIONS, STATUTE OF. 3.

PLEADINGS—Amendment of—No title at date of writ—Subsequent acquirement of title - - - - - - 48
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POOR LAW UNION—Officers of—Contract of service - - - - - - 244
See NATIONAL INSURANCE ACT, 1911. 1.

POOR RATE—*Statutable deduction for poor rate—Waiver for many years of right to make deduction—Mistake and ignorance of law—Presumption of lost deed.*] The defendants and their predecessors in title had, since 1838, paid to the plaintiff and her predecessor in title a rentcharge of £50 Irish, charged on certain premises vested in the defendants, without making any deduction for poor rate. In 1911, the defendants for the first time claimed to make the statutory deduction

POOR RATE—*continued.*

for poor rate. *Held*, that mistake and ignorance of law was a reasonable explanation, and that a lost deed releasing the right to make the statutory deduction for poor rate ought not to be presumed against the defendants. *Corcoran* v. *Wade* [Ross, J., 25

PORTION—Trust of fund as portion of daughter on marriage—Resulting trust 177, 182
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POST-OFFICE—Supply of water to premises not on valuation list - - 238
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POWER OF APPOINTMENT—*Will—Special Power of Appointment—Change of Investment—Ademption of appointed share.*] A testatrix had, under her marriage settlement, a life interest in £900 Government 3 per cent. Irish Consolidated Annuities, with power to appoint the same to her children. At the date of her will the annuities had been sold, and the proceeds invested in New Zealand Bonds. By her will, after reciting that she was possessed of New Zealand Bonds, amounting to the sum of £900 or thereabouts, and bank and other shares, she bequeathed the New Zealand Bonds and the shares to her daughter, not referring in any way to the settlement. The New Zealand Bonds were afterwards sold, and the proceeds invested in Consols, and so remained at the date of her death. *Held*, that the will was an appointment of the New Zealand Bonds only, and that, as they had ceased to form part of the trust funds at the death of the testatrix, when the will operated, the appointment failed, and the trust fund went as in default of appointment. *Holmes* v. *Langley* . . . . . M. R. 232

2. —— *Will—Special power of appointment—Invalid execution—Power to be exercised by ante-nuptial settlement with consent of trustees of will—Post-nuptial settlement executed without such consent and in ignorance of power—Possession under invalid appointment—Title under will barred—Estate tail—Statute of Limitations—Real Property Limitation Act*, 1833 (3 & 4 *Wm.* 4, *c.* 27), *ss.* 21, 34—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.] By a post-nuptial settlement made in the year 1877 between *C.*, the wife, *W.*, the husband, and the trustees of their ante-nuptial settlement, reciting that *C.* and her husband in her right had become entitled to the absolute interest in certain lands known as the *W. S.* estate, a life estate in these lands was limited to *W.*, if he survived *C.*, with successive life estates to the three children of the marriage, with remainders to their children in tail. All the parties at the time erroneously believed that the estate had vested in *C* for an absolute estate in fee-simple, as heiress-at-law of her grand-uncle. In fact, however, *C.*'s father, *J.*, had survived this grand-uncle, and was his heir-at-law, and as such the lands had vested in him for an estate in fee-simple in remainder, subject to certain prior estates which subsequently determined. *J.* had died before *C.*'s marriage, having made a will by which he devised all his real estate to *C.* for life, with remainder to her first and other sons in tail male, and he empowered the trustees for the time being of his will, with the consent of *C.*, to convey the lands, by a settlement to be made on the occasion of her marriage, to *C.* and her husband for their joint lives and the life of the survivor. The will contained provisions altering the limitations in favour of *C.*'s sons in case of her marriage with a husband entitled to real estate of certain value. The trustees of this will were not parties to the settlement of 1877. *C.* died in 1882, and *W.* thereupon entered into possession of the *W. S.* estate, and continued in possession until his death in 1905. The eldest son of the marriage had died in 1900, and on the death of *W.*, the second son, *R.* (who was entitled to a life estate under the settlement, and to an estate tail, if not barred by the Statute of Limitations, under the will), entered into possession. *R.* was entitled to an estate tail in certain other lands, and after his father's death he executed a disentailing deed which contained general words barring all his estates tail. He died in 1907, having made a will devising all his lands to his wife, through whom the plaintiffs claimed as assignees in her bankruptcy. On the death of *R.*, the defendant, the third child of the marriage of *W.* and *C.*, went into possession of the W. S. estate, she being entitled under the settlement to the next life estate. Until shortly before the bringing of the present action all parties believed that the settlement of 1877 was a valid settlement. The action sought a declaration that the plaintiffs were entitled to the *W. S.* estate in fee-simple, and an order that the defendant should deliver up possession to them, the plaintiffs claiming under the will of *J.*, and through *R. Held*, that the settlement of 1877 was not a good execution of the power given by *J.*'s will, inasmuch as it was not executed on the occasion of *C.*'s marriage, and the trustees of that will were not parties to it: that the possession of *W.* was therefore wrongful, and that although having entered under the settlement he would have been estopped from repudiating any of the limitations created by it, his possession operated under the Statute of Limitations to extinguish the title of his eldest son to the estate tail given by *J.*'s will, and consequently also the title of *R.* to the subsequent estate tail under that will, and that the plaintiffs had no right to possession. *Frazer* v. *Riversdale* - - - - - Ross, J., 539

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SETTLED ESTATES ACT, 1877—Agreement for sale by limited owner—Jurisdiction of Land Judge to enforce specific performance - - - - - 165
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SETTLED LAND ACTS—*Vendor and purchaser—Conditions of sale—Title—Lands subject to rentcharges—Sale by tenant for life—Sale in lots—Power to charge moneys paid on foot of apportioned part of rentcharge on unsold lot—Settled Land Act*, 1882, *sects.* 4 (3); 5; 20 (1), (2); 55 (2).] A tenant for life put up for sale by private treaty lands subject to a rentcharge, in six separate lots, subject to a condition that each lot would be sold subject to the entire rentcharge, but primarily liable for an apportioned part thereof, and that the purchaser of each lot should covenant for the payment of such apportioned part, and for the indemnity of the other lots as regards such apportioned part only, and should charge all moneys payable on foot of such covenant on such lot, and that the vendor for the purpose of such condition should stand in the place of, and be deemed to be, the purchaser of any unsold lot or lots. *Held*, that

SETTLED LAND ACTS—*continued.*

this was a valid condition on such a sale. *In re Biggs-Atkinson and Ryan's Contract*

[Barton, J., 125

SETTLEMENT—*Marriage articles—Covenant to settle by tenant in tail—"Voidable estate"—Subsequent disentailing deed by covenantor of portion of lands to uses inconsistent with articles—Provisions of articles let in—Disentailing deed by next tenant in tail of other portion of lands—Election—Trust for "child or children or remoter issue"—Taking* per stirpes*—Usual clauses in settlement—Hotchpot—Cross-remainders—Application of principle of hotchpot to real estate.*] By marriage articles, *B.* the intended husband, being entitled as tenant in tail in remainder to three estates, the Menlo, Waterview, and Puxley estates, covenanted to convey to trustees all real estate to which he was, or during the coverture should become, entitled in fee tail in possession or remainder for all such estate as he could convey therein. It was thereby declared that the trustees should stand seised of all such real estate on trust for *B* for life with remainder to *C*, the intended wife for life, for her separate use without power of anticipation. And it was also declared that, after the said life estates, the trustees should stand seised of all such real estate with remainder to the child or children or remoter issue of the said intended marriage, or any or either of them, in such manner as *B* should, by the settlement to be made, appoint. And it was further agreed that the settlement should contain all powers, provisions, clauses, and agreements, as are usually inserted in marriage settlements as *B* should by the settlement agree to. By post-nuptial settlement *B*, with the consent of the protector and the concurrence of *C*, disentailed the Menlo estate, and conveyed it to the trustees of the articles on trust, after his own life estate, to raise a jointure for *C*, and £2000 for portions for younger children as *B* and *C* should appoint, and, subject thereto, to the eldest son in tail. In execution of that power, *B* and *C* jointly appointed the £2000 among three children, to be raised after the death of the husband, and in priority to the wife's jointure. By a subsequent disentailing deed, *B* disentailed the Waterview estate to his own use, and did not re-settle it. By his will he purported to leave it absolutely to *C*. *B* died without disentailing the Puxley estate, and the next tenant in tail, the eldest son of the marriage, subsequently disentailed. *Held*—(*a*) That the articles settled a voidable estate in fee-simple in all the estates; that as regards the Menlo estate, the effect of the disentailing deed and re-settlement was to capture the fee-simple of the estate for the trusts of the marriage articles, and that the settlement must be disregarded so far as it was

SETTLEMENT—*continued.*

inconsistent with the articles. (*b*) That a hotchpot clause, and a clause providing for cross-remainders, should, in view of the provisions contained in the articles, be read into the articles. (*c*) That the attempt in the settlement to give the portions term priority to the wife's life estate, and to cut down her life estate to a jointure, was void as being inconsistent with the articles. (*d*) That the Waterview estate was captured by the articles on the execution of the disentailing deed. (*e*) That the Puxley estate was not captured by the articles, the settlor having died without executing a disentailing deed, but that the eldest son, who disentailed, if he elected to take under the settlement and articles, must bring in the Puxley estate as if he had disentailed it to the uses of the articles, and must also bring the value of his tenancy in tail in the Menlo estate into hotchpot. *Blake* v. *Blake* - - - - - Barton, J., 343

2.——*Marriage settlement—Construction of—Annuity for wife to arise in certain events during the life of the husband, and jointure after his death—Two severable annuities—Covenant against alienation—Consent of landlord given after alienation.*] By marriage settlement, lands held under leasehold and chattel leases were conveyed to trustees on trust to permit the wife to receive and take out of the rents, issues, and profits thereof a yearly rent-charge or annuity of £100 sterling during her life, in case she should survive the husband, or in case the husband should during her life become bankrupt or assign, charge, or encumber the said premises, or suffer something whereby the said premises or some part thereof would through his act or default, or by operation or process of law, become vested in some other person or persons, and subject thereto in trust for the husband. The husband, without the knowledge of the trustees or the wife, deposited the leases by way of equitable mortgage, and died more than twelve years afterwards. One of the leases contained a strict covenant against alienation. *Held* (*a*) that the annuity which arose when the husband encumbered the premises by depositing these leases with the bank, was barred; (*b*) that, at the husband's death, the widow became entitled to an annuity "in case she should survive her husband," which was in effect an independent annuity; and (*c*) that no estate passed by the settlement in the premises comprised in the lease which contained a covenant against alienation. *Field* v. *Grady* - - - - - Barton, J., 121.

3.—— *Marriage settlement—Trust funds supplied by intended wife's father described as being "as and for her marriage-portion or fortune"—Failure of express trust in actual events—Resulting trust, whether in favour of intended wife or of her father—Express provisions in settlement negativing*

SETTLEMENT—*continued.*

hypothesis of absolute gift to intended wife.] By settlement executed on the marriage of *A*'s daughter, *B*, with *D*, *A* covenanted to execute to the trustees of the settlement two bonds to secure £3000 each, one to bear interest from its date, the other from *A*'s death, both bonds to be payable after his death, "as and for the marriage portion or fortune" of his said daughter. *D*'s father, *C*, thereby also covenanted to execute to the trustees a bond to secure £5000. The trusts were to pay the interest of the three sums, so secured, to *D* for life, and after his death to *B*, if then living, for life, in bar of all her claims under *A*'s own marriage settlement. Then followed trusts for the issse of the marriage. Power was given to *B*, if she predeceased her husband without issue, to appoint by will £2000, part of the £3000 secured by *A*'s first-mentioned bond, as she might think fit, in which case the residue of that £3000 was not to be payable, but was to enure for *A*'s benefit. In default of issue, there was an express ultimate limitation of the second sum of £3000 to *A*, and of the £5000 to *C*, and *D* was given a general power of appointing £2000, part of this sum of £5000. *B* survived *A* and *D* for many years. There was no issue of the marriage. *Held*, that while *Ward* v. *Dyas* (LL. & G. *temp.* Sugden, 177) and the cases which have followed it are to be treated as unimpeachable authorities, the rule of construction thereby laid down is subject to be rendered inapplicable by a contrary intention shown by express provisions of the instrument itself, and that there was sufficient in the present settlement to show that the intention of the parties was that the resulting trust of the first-mentioned £3000, in the events which happened, was in favour of *A* and not of *B*. *In re Donnelly's Estate*

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3 Edw. 7, c 37, s. 3—Irish Land 402, 408
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7 Edw. 7, c. 56, s. 2 (4)—Evicted Tenants (Ireland) - - - - - - 414
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8 Edw. 7, c. 69, s. 215—Companies (Consolidation) Act - - - - - 352
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TRUSTEES—*Investment—Will—Power to trustees to "invest" as they should think desirable, but not in the British funds—Purchase of freeholds.*] A will contained the following investment clause:—"My trustees being at liberty to sell all my ships, houses, and other property of mine, and invest same as they think most desirable, but not in the British funds, my trustees to be free from all liability in investing any of the money received for the sale of any of my property." *Held*, that the above clause authorized the trustees to invest the proceeds of sale in the purchase of freehold lands in England and Ireland. *Grace* v. *Walsh* [M. R. 69

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TURBARY—*Right of*—Profit à prendre—*Purchase agreement—Tenant purchaser—Land Purchase Acts—Free turbary on specified bog—Right of allotment by owner of bog—Convenience—Management of bog.* The plaintiffs were seven tenants, on the estate of Lord S., who purchased their holdings under the Land Purchase Acts by agreements which were all executed upon the same day, and contained the following provision:—"The tenant is to have the right of turbary for his own use on the bog in the vendor's possession, marked No. 1 on the map." Lord S., after retaining the bog in his own possession for several years, conveyed it to the defendant in fee-simple, for valuable consideration, subject to the rights of the plaintiffs. The plaintiffs had no fixed turf-banks which they could claim as their own. It was proved that irregular and indiscriminate cutting had caused, and was calculated to cause, waste and bogslides, and thereby to injure and ultimately destroy the bog. Disputes arose between the plaintiffs and defendants as to the nature and extent of their respective rights, and as to the manner in which, and person by whom, the turf-banks should be allotted. These questions were raised by claim and counter-claim in the action. *Held*: (1) That the plaintiffs were entitled to enter upon the bog, and to cut and carry away free turf for the use of their holdings, and for that purpose to have

TURBARY—*continued.*

annually allotted to them, at a reasonable time of the year, turf-banks in such parts of the bog reasonably convenient to them, as should not be prejudicial to the due preservation of the bog, or be likely to cause waste or bogslides therein, and to reasonable notice of such allotment. (2) That the defendant was entitled annually to allot, at reasonable times of the year, and after reasonable notice to plaintiffs, turf-banks at such places in the bog, reasonably convenient to them, as should not be prejudicial to the preservation of the bog, or be likely to cause waste or bogslides therein. (3) That in allotting turf-banks the primary consideration should be the due preservation of the bog, and that the defendant's right of working the remainder of the bog, for his own profit, was subject to, and should be subordinated to, the plaintiffs' prior right of turbary. *Fitzpatrick* v. *Verschoyle* [BARTON, J., 8

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—— Contract for sale of settled land—Specific performance—Jurisdiction of Land Judge to enforce - - - - - 165
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VOLUNTARY CONVEYANCE — *Voluntary conveyance of lands—Trusts for infants—Subsequent purchaser for value—Onus of proving voluntary conveyance made* bona fide—10 *Ch.* 1 (*Ir.*), *Sess.* 2, *c.* 3, *s.* 1 — *Voluntary Conveyances Act*, 1893 (56 & 57 *Vict. c.* 21), *s.* 2—*Conveyance with intent to defraud creditors—Nature of fraud required to be proved—Onus of proof*—10 *Ch.* 1 (*Ir.*), *Sess.* 2, *c.* 3, *s.* 10.] Where a voluntary conveyance of lands is impeached by a subsequent purchaser for value, the onus of proving that such conveyance was made *bona fide* and without fraudulent intent, so as to bring it within the protection of sect. 2 of the Voluntary Conveyances Act, 1893, lies on the party seeking to uphold such voluntary conveyance. Where infants were unable to prove affirmatively

VOLUNTARY CONVEYANCE—*continued.*

the *bona fides* of a voluntary conveyance of lands executed in their favour by their father, the conveyance was held void as against a subsequent purchaser for value. To bring a deed within s. 10 of 10 Ch. 1 (Ir.), Sess. 2, c. 3, as being made with intent to defraud creditors, the deed must be fraudulent in its conception or execution. A subsequent fraudulent dealing with the property comprised in the deed cannot avoid it. The onus of proof is cast on the party impeaching the deed. *National Bank, Limited* v. *Behan* - M. R. 512

WATER—Supply for domestic purposes—Post-office premises not on valuation list and not rated - - - - - 238
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WILL—*Construction—Beneficial interest or trust.*] *A* bequeathed his property to his wife, in the following terms:—"I leave and bequeath all my property, chattels, money, bank shares, and my life insurance, or whatever I am possessed of, or entitled to, to my beloved wife to be disposed of as she may think best, for the good of our children," *Held*, that under this bequest the wife became entitled beneficially to the whole of the property, *Berryman* v. *Berryman* - - M. R. 21

2. —— *Construction — Beneficial interest or trust.*] A testator bequeathed to his wife his entire worldly effects to be managed as best she could for the benefit of their children. *Held*, that the wife took no beneficial interest. *Hickey* v. *Hickey* - - - - - - App. 390

3. —— *Construction—Devise to one and "his lawful eldest male issue"—Gift over "in default of male issue . . . and not attaining lawful age"*—Nomen collectivum.] A testator, by his will made in 1848, devised fee-simple lands to trustees "for the use of my grandson *G.*, . . . and his *lawful eldest male issue*, . . . and *in default of male issue of the said G., and not attaining lawful age, in that case then to go to* my grandsons *D.* and *H.* in equal divisions, and their lawful heirs." *Held*, that the words "lawful eldest male issue" should be construed as *nomen collectivum*, the word "eldest" indicating the order of succession; and, accordingly, that *G.* took an estate in tail male. *Lovelace* v. *Lovelace* (Cro. Eliz. 40), and *Sheridan* v. *O'Reilly* ([1900] 1 I. R. 386), distinguished. *Lewis* v. *Puxley* (16 M. & W. 733), and *Doe* d. *Tremeween* v. *Permeween* (11 A. & E. 431), applied. *In re Finlay's Estate* [Wylie, J., 143

4. —— *Construction—Executory devise over on a contingency—Restricted to time prior to period of distribution—Vesting of estate.*] In a will, where there is a period of distribution, a gift over on death means death before the period of distribution. A testator devised all his property to trustees on trust for the support and maintenance of his wife and daughter, and any other of his children, and directed the trustees, when any child or children should attain twenty-one years of age or marry, to apportion the property equally among them, subject to an annuity to his wife. The will contained a proviso directing that, in the event of the said daughter dying during the lifetime of her mother, she should have a life use of the estate, and on her decease it should become the absolute property of testator's brother. The daughter attained twenty-one years of age and married, but predeceased her mother. *Held*, that the property vested absolutely in the daughter at twenty-one or marriage, and was not divested by the proviso. *In re Kerr's Estate* - - - - - Ross, J., 214

5. ——*Construction—Survivorship—Gift over—"Other and others."*] Under a gift, in the event of a daughter dying without being married, to the other and others of the testator's daughters by name in equal shares, the words "other and others" will not be read as "survivor and survivors," unless the context requires it. A [illegible], having three unmarried daughters, *C.*, *J.*, and *L.*, and one married daughter *E. G.*, directed his trustees to divide the net proceeds of his property between his daughters *C.*, *J.*, and *L.*, in equal shares, their shares to become vested and payable on marriage, the yearly interest to be paid to each in the meantime, and if any of them, the said *C.*, *J.*, and *L.*, should die without being married, then, as well the original shares thereby given to her so dying, as any other share which she should have taken by survivorship or accruer, should go and belong to the other and others of them and also to the said *E. G.*, in equal shares. *C.* married, *J.* and *L.* never married. *C.*, *E. G.*, and *J.* predeceased *L.* On the death of *L.*, the question arose, Who was entitled to the fund which represented the shares of *J.* and *L*? *Held*, that the words, "other and others" should not be read as equivalent to "survivor and survivors," but were to be read in their ordinary meaning, and that the fund was divisible between the representatives of *C.* and *E. G.*, equally. *Stanley* v. *Bond* [M.R. 170

6—— *Execution—Attesting Witness contradicting his previous evidence—Local Registration of Title (Ireland) Act*, 1891, *s.* 34—*Power to rectify the register.*] *Held*, by the Master of the Rolls, that an affidavit prepared without any reference to the person who is to swear it loses much of the weight and importance it would otherwise have. Therefore where the surviving witness to a will

WILL—*continued.*

had sixteen years before sworn an affidavit of due execution of the will, prepared under such circumstances, the Court nevertheless condemned the will upon his evidence that the will had not been in fact duly executed, and that he had sworn the affidavit on the former occasion without sufficiently adverting to its contents. *Wright* v. *Rogers* (1 P. & D. 678) distinguished. *Held* also, by the Master of the Rolls, that having regard to the provisions of section 34 (1) of the Local Registration of Title (Ireland) Act, 1891, the Court can, in such a case, direct the Register to be rectified, where a title has been registered upon the basis of the will which the Court condemns. The Court of Appeal reversed the decision of the Master of the Rolls, expressing no opinion on the question relating to the Local Registration of Title (Ireland) Act, 1891. *Goodisson* v. *Goodisson* [M.R. 31 ; App. 218

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—— Charitable devise—Will executed within three months of death—Devise to parish priest—Gift to office—Trust for heir-at-law and annuitant - - - - 1
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THE END.